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THE LAW OF CRIMES.

THE
LAW OF CRIMES.

BY
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THIRD EDITION

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BOSTON:
LITTLE, BROWN, AND COMPANY.
1905.

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1905

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THE UNIVERSITY PRESS, CAMBRIDGE, U. S. A.

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2-5742

PREFACE TO THE THIRD EDITION.

IN the preparation of the present edition the aim has been the same as with the first and second editions, namely, to make a book that might be of service both to the student and to the profession at large. With these ends in view, the additional space made available by the enlarged size of the present edition has been utilized in two ways: first, the general principles of the criminal law underlying all applications of it have been stated somewhat more in detail, and more fully illustrated by examples, and the same course has been followed, wherever it seemed advisable, in dealing with the specific offences; second, the citations have been increased, the aim being particularly to add recent cases showing the present application and condition of the common law of crimes. As a matter of convenience to both practitioner and student, in citing cases, references have been made, not only to the official reports but to the national reporter series and to collections of criminal cases. It being recognized, however, that this is an elementary treatise, no attempt has been made, either in discussion of principles or citation of cases, to be exhaustive.

The text and arrangement of paragraphs of the second edition have, with a few unimportant exceptions, been preserved intact, and the table of corresponding sections prepared by Professor Beale, the editor of the second edition, has been retained as being equally applicable to the present edition. The paragraphs and sections added by the present editor have been indicated in the list following the table of corresponding sections.

The editor has derived assistance from the collections of cases of Professor Beale and Professor Mikell. As a second edition of Professor Beale's work will probably before long supersede the present edition, it was not considered advisable to insert references thereto.

In addition to the usual abbreviations the following have been used :

C. = Chaplin's Cases on Criminal Law.

K. = Kenny's Cases on Criminal Law.

M. = Mikell's Cases on Criminal Law.

PREFACE TO THE SECOND EDITION.

IN preparing a second edition of May's Criminal Law, it seemed best for the sake of completeness to treat certain subjects which had not been considered by the author. The original plan of the work included no discussion of the subjects of Criminal Pleading and Practice; but it was found that it would be better adapted for the use of students if those subjects were briefly considered, and this has accordingly been done. Much has also been added to the first chapter, which contains the general principles underlying the criminal law.

No attempt has been made by the editor to treat the subjects he has introduced in an exhaustive manner, or to make a complete collection of authorities. He has endeavored, in adding to the text, to imitate the clearness and conciseness of the author; and in citing new cases, he has intended to include only such as illustrate principles not before stated.

The alphabetical arrangement of crimes, adopted by the author after some misgivings, has proved inconvenient, and is now abandoned; and the second part of the work has been rearranged according to

what is hoped to be a more satisfactory method. The arrangement is in the main that of Blackstone and of Bishop.

The numbering of the sections is of course entirely changed. For the purpose of comparison, a table is given by which the section of this edition may be found which corresponds with each section of the first edition. It was impracticable to note the additions of the editor in the text itself; but a list of the chief additions has been prepared, so that it is easy to discover which of the statements of law are supported by the authority of Judge May.

Thanks are due to Professor Robinson of the Yale Law School for kind suggestions. Much assistance has been obtained from Mr. H. W. Chaplin's excellent collection of Cases on Criminal Law.

PREFACE TO THE FIRST EDITION.

IN the following pages the author has endeavored to state briefly the general principles underlying the Criminal Law, and to define the several common law crimes, and such statutory crimes — *mala in se*, and not merely *mala prohibita* or police regulations¹ — as may be said to be common statute crimes.

The brevity of this treatise did not admit of a history of what the law has been, nor a discussion of what it ought to be; but only a statement of what it is. In the cases cited will be found ample learning upon the first of these points. Digressions upon the second would be out of place in a book designed as a lawyer's and student's hand-book.

The alphabetical arrangement has been adopted in the second chapter, as on the whole more convenient for the practising lawyer. The student, however, will perhaps find it to his advantage, on first perusal, instead of reading consecutively, to pursue the more

¹ On the question of the limitation of this power of police regulation, see 2 Kent's Com. 340; *Com. v. Alger*, 7 Cush. (Mass.) 53; *Thorp v. R. & B. Railroad Co.*, 27 Vt. 149; *Slaughter-House Cases*, 16 Wall. (U. S.) 36.

scientific method of grouping the titles ; taking first, for instance, crimes against the person, — as Assault, Homicide, and the other crimes where force applied to the person is a leading characteristic ; then crimes against property, — as Larceny, Embezzlement, Cheating, False Pretences, and the like, where fraud is a leading characteristic ; to be followed by Robbery, Burglary, Arson, and Malicious Mischief ; and concluding with such crimes as militate against the public peace, safety, morals, good order, and policy, — as Nuisances generally, Treason, Blasphemy, Libel, Adultery, and the like.

If the author has succeeded in his design, the practising lawyer may readily find within the compass of these few pages the law which he seeks, and the authorities in its support.

J. W. M.

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 52 (2d par., 3d par. first part, 4th par.)
 58 (first part)
 59 (last half)
 60 (2d par.)
 62 (last half)
 64 (1st par. last half, 2d and 3d pars.,
 5th par. last part)
 65 (last half)
 67 (1st par. last part)
 67 *a*
 68 (2d par. last part, 3d par.)
 69 (3d par., 4th par. except first sen.)
 77 (2d par.)
 77 *a*
 79 (1st par. middle, 2d par.)
 142 *a*
 148 (2d par. first half)
 150 (4th par. last part)
 153 *a*
 155 *a*
 156 (2d par.)
 176 (last part)
 180 (1st par. last part)
 184 (1st par. middle, 3d par.)
 184 *a*
 186 (2d par.)
 187 (3d par. end, 4th par. first part,
 last part)
 188 (3d par.)
 196 (2d par. last half)
 197 (1st par. last part)
 208 (2d par., 4th par.)
 209 (last part)
 212 (3d par.)
 213 (2d par.)
 221 (2d par. end)
 225 (2d par.)
 227 (2d par.)
 228 (3d par. last half)
 229 (2d par. middle)
 230 (2d par. last part, 4th par. first
 part)

SECTION

- 243 (1st par. middle, 2d par. first part)
 244 (2d par. last part)
 247 (1st par. last part)
 263 (last part)
 271 (1st par. last part)
 272 (2d par. last part, 4th par.)
 273 (2d par.)
 275 (4th par.)
 277 (1st par. last part, 2d and 3d pars.,
 5th par.)
 277 *a*
 278 (2d par.)
 278 *a* (1st to 5th pars.)
 280 (1st par. middle, 2d par.)
 281 (last part)
 282 (1st par. last part, 2d par. last part)
 283 (1st par. last half, 3d par. last part)
 284 (1st par. middle, 3d, 4th, and 5th
 pars.)
 285 (2d par. middle, 3d par.)
 285 *a*
 286 (1st par. last half)
 287 (2d and 3d pars.)
 288 (1st par. last part, 2d par.)
 290 *a*
 295 (2d par. last part)
 300 (1st par. middle)
 301 (2d par. last part)
 302 (1st par. middle)
 303 (last part)
 304 (last part)
 306 (1st par. last part, 2d par. last half)
 308 (1st par. last part, 2d par. middle)
 310 (2d par.)
 313 (1st par. last part, 2d par. last part)
 314 (middle)
 315 (2d par. last half)
 317 (2d par.)
 322 (5th par.)
 327 (2d par.)
 334 (1st par. middle)
 338 (5th par. last half)

CRIMINAL LAW.

CHAPTER I.

OF THE DEFINITION OF CRIME, AND OF CERTAIN GENERAL PRINCIPLES APPLICABLE THERETO.

§ 1. Crime defined.	§ 53. Intent in Statutory Crimes.
6. The Criminal Act.	58. Justification for Crime.
26. The Criminal Intent.	69. Classification of Criminals.
35. Criminal Capacity.	77. Locality and Jurisdiction.

CRIME DEFINED.

§ 1. **Crime** is a violation or neglect of legal duty, of so much public importance that the law, either common or statute, takes notice of and punishes it.¹

§ 2. **By What Law Defined.** — Crimes are defined both by the common and by the statute laws, — the common law prevailing, so far as it is applicable and not abrogated by statute, in most of the States of the Union.² The general maxims and precepts of Christianity constitute a part of the common law.³ The law of nations, also, is part of the common law.⁴

¹ See 4 Bl. Com., p. 4, and note by Christian (Sharswood's ed., 1860); *Rex v. Wheatly*, 2 Burr. 1125, 1 Lead. Cr. Cas. 1-34, 1 Bish. Cr. Law, § 32.

² *S. v. Danforth*, 3 Conn. 112; *C. v. Knowlton*, 2 Mass. 530, C. 1; *C. v. Chapman*, 13 Met. (Mass.) 68.

³ *Rex v. Wodston*, 2 Stra. 834; *Ex parte Delaney*, 43 Cal. 478; *S. v. Chandler*, 2 Har. (Del.) 553; *P. v. Ruggles*, 8 Johns. (N. Y.) 290; *Updegraph v. C.*, 11 S. & R. (Pa.) 394; *Vidal v. Girard's Executors*, 2 How. (U. S.) 127.

⁴ *U. S. v. Smith*, 5 Wheat. (U. S.) 153; *Resp. v. De Longchamps*, 1 Dall. (Pa.) 111, M. 33.

When the older States were settled the colonists brought with them the English criminal law as it was then¹ in force: this embraced the English common law of crimes and its then existing statutory modifications.²

This general body of law was modified and discarded where not applicable to local conditions: thus the common law of Pennsylvania does not recognize the punishment of crimes by the ducking stool.³ On the other hand, local customs were added to it by receiving judicial recognition: thus the exemption, not only of clergymen of the Established church, as in England, but of all denominations, from being obliged to perform certain public duties.⁴ It was also further changed by acts of the local provincial legislatures and by acts of Parliament specifically extending to the colonies.

Similarly with the later settled States; they being settled by those who carried the common law with them are governed by its principles.⁵ In Louisiana where the original body of law was the civil and not the common law, the latter has been adopted by statute as to the definition of certain enumerated offences and as to procedure.⁶ In several States the common law of crimes has been done away with by express repeal or by implication from the enactment of complete codes of criminal law.⁷

¹ Compare *C. v. Warren*, 6 Mass. 72, C. 11, and *C. v. Warren and Johnson*, 6 Mass. 73, C. 12.

² *C. v. Leach*, 1 Mass. 59, C. 9; *C. v. Knowlton*, *ante*; *C. v. Newell*, 7 Mass. 245; *C. v. Chapman*, *ante*; *S. v. Rollins*, 8 N. H. 550; *Resp. v. Mesca*, 1 Dall. (Pa.) 73, M. 10.

³ *James v. C.*, 12 S. & R. (Pa.) 220, M. 7.

⁴ *Guardians v. Greene*, 5 Binney (Pa.), 554, M. 5; see also, *Resp. v. Roberts*, 1 Yeates (Pa.), 6, M. 13.

⁵ *Smith v. P.*, 25 Ill. 17; *Re Lamphere*, 61 Mich. 105, 27 N. W. 882; *S. v. Pulle*, 12 Minn. 164, M. 16; *Terr. v. Ye Wan*, 2 Mont. 478; *contra*, *Estes v. Carter*, 10 Ia. 400; *Vanvalkenberg v. S.*, 11 O. 404; *Smith v. S.*, 12 O. St. 466.

⁶ *S. v. Smith*, 30 La. Ann. 846. In Hawaii the common law is in force only in so far as it is applicable to local conditions and adopted by the courts: *King v. Agnee*, 3 Haw. 106.

⁷ *William v. S.*, 18 Ga. 356; *Hackney v. S.*, 8 Ind. 494; *Jones v. S.*, 59 Ind. 229; *S. v. Young*, 55 Kan. 349, 40 P. 659; *Re Lamphere*, 61 Mich.

§ 3. **Statutory Crimes.** — A large part of the criminal law of the jurisdictions in this country consists of statutes. Every statute relating to crime must be interpreted in the light of the common law of crime ;¹ and the repeal of a statute, not substituting other provisions in the place of those repealed, revives the pre-existing law.²

Statutes, in general, can have no retroactive efficacy ; and, especially in the United States, all *ex post facto* laws, or laws which make criminally punishable an act which was not so punishable at the time it was committed, or punish an offence by a different kind of punishment, or in a different manner, not diminishing the punishment, from that by which it was punishable before the statutes were passed, are prohibited by the Constitution of the United States.³

On the other hand, when the common law or a statute creating an offence is repealed, or expires before judgment in a criminal case, judgment cannot be entered against the prisoner, unless by a saving clause in the statute excepting pending cases ; and in such cases, if the statute expires after judgment and before execution, the judgment will be reversed or execution stayed.⁴ But laws changing the rules of evidence or of procedure⁵ do not come under the category of *ex post facto* laws.

If a statute define a new offence, or prohibit a particular act, without providing any mode of prosecution or punishment, the common law steps in and supplies the mode, by indictment ; and the punishment, by fine and imprisonment.⁶ Thus

105, 27 N. W. 882 ; *Ex parte Meyers*, 44 Mo. 279 ; *S. v. De Wolfe* (Neb.), 93 N. W. 746 ; *S. v. Vowels*, 4 Or. 324 ; *S. v. Gaunt*, 13 Or. 115, 9 P. 55.

¹ *U. S. v. Carll*, 105 U. S. 611.

² *C. v. Churchill*, 2 Met. (Mass.) 118, C. 2.

³ *Hartung v. P.*, 26 N. Y. 167, 28 N. Y. 400 ; *S. v. Kent*, 65 N. C. 311 ; *Calder v. Bull*, 3 Dall. (U. S.) 386.

⁴ *S. v. Daley*, 29 Conn. 272 ; *Taylor v. S.*, 7 Blackf. (Ind.) 93 ; *C. v. Marshall*, 11 Pick. (Mass.) 350 ; *Hartung v. P.*, 22 N. Y. 95 ; *C. v. Pa. Canal Co.*, 66 Pa. 41 ; *U. S. v. Finlay*, 1 Abb. (C. Ct. U. S.) 364, Fed. Cas. No. 15,099.

⁵ *Stokes v. P.*, 53 N. Y. 164 ; *P. v. Mortimer*, 46 Cal. 114.

⁶ *Keller v. S.*, 11 Md. 525 ; *C. v. Chapman*, 13 Met. (Mass.) 68 ; *S. v.*

where a statute in separate sections forbade liquor selling in various districts; and provided that a person violating sections four, five, or six should be guilty of a misdemeanor, it was held that the common law supplied the punishment for the violation of section seven.¹

§ 4. **Criminal Law of the United States.** — Under the government of the United States there are, strictly speaking, no common law crimes. That government has never adopted the common law.² Its criminal jurisdiction depends entirely upon statutory provision authorized by the Constitution; and where the statute makes punishable a crime known to and defined by the common law, but does not itself define the crime, the common law is resorted to for the definition.³

Crimes committed within its exclusive jurisdiction within the States are by statute to be punished in the same manner as such crimes are punished by the laws of the particular States where they are committed.⁴

§ 5. **Act and Intent Must Coexist.** — Every common law crime consists of two elements: first, the voluntary commission of an act which is declared by law to be criminal; second, the existence in the offender of a state of mind which is declared by law to be consistent with criminality. This principle is more briefly expressed in the rule that for the commission of a crime a criminal act must be done with criminal intent. Thus, if the defendant does an act that the law forbids but there is no accompanying criminal state of mind there is no crime, such as an act by an infant under seven, or by an in-

Fletcher, 5 N. H. 257; *S. v. Patton*, 4 Ired. (N. C.) 16; *C. v. Piper*, 9 Leigh (Va.), 657.

¹ *S. v. Parker*, 91 N. C. 650, M. 15; *S. v. La Forrest*, 71 Vt. 311, 45 Atl. 225.

² *U. S. v. Hudson*, 7 Cranch (U. S.), 32; *U. S. v. Coolidge*, 1 Wheat. (U. S.) 415; *Re Greene*, 52 Fed. 104; *U. S. v. Britton*, 105 U. S. 199; *Manchester v. Mass.*, 139 U. S. 240. In Ohio and Iowa the same theory prevails: *Mitchell v. S.*, 42 O. St. 383; *Estes v. Carter*, 10 Ia. 400. In Indiana, the common law, so far as it creates crimes, is abolished by statute.

³ *U. S. v. Hudson*, 7 Cranch (U. S.), 32; 1 Bish. Cr. Law, § 194.

⁴ *U. S. v. Paul*, 6 Pet. (U. S.) 141.

sane person.¹ So where a person is indicted for entering with intent to steal, or with intent to commit a felony, if his intent is not to steal or is to do an act not amounting to a felony the indictment cannot be sustained.² On the other hand, a mere intent, no matter how evil, is not punishable: thus going to A's house with the intent to beat him and insulting him in order to provoke a quarrel does not justify a conviction for assault and battery;³ so having counterfeiting dies in one's possession, even though with an intent to counterfeit, is not punishable at common law, there being no act by the defendant;⁴ so an intent to defraud the revenue where nothing is actually done is not punishable;⁵ nor an intent to cheat by false pretences if the representations are in fact true;⁶ nor to administer noxious drugs if the drug in fact administered is not noxious.⁷ So *a fortiori*, if A, having agreed to engage in a criminal act, withdraws before the commission thereof, so that at the time he neither has a criminal state of mind nor performs a criminal act.⁸

These two elements of act and intent must coexist. So, if the defendant does an act in a non-criminal state of mind, a later-arising criminal intent cannot be referred back to that act so as to make it criminal; thus where an officer enters a house to serve a warrant and while in the house engages in a criminal act his original entry does not thereby become crimi-

¹ *Post*, §§ 36, 44.

² *Rex v. Knight*, 2 East P. C. 510, C. 111; *C. v. Newell*, 7 Mass. 245, C. 109; *S. v. Cooper*, 16 Vt. 551.

³ *Yoes v. S.*, 9 Ark. 42, M. 20.

⁴ *Rex v. Heath*, R. & R. 184; *Dugdale v. Reg.* 1 E. & B. 435; *S. v. Penny*, 1 Car. Law Rep. 517; *contra*, and overruled, *Rex v. Sutton*, 2 Stra. 1074.

⁵ *U. S. v. Riddle*, 5 Cranch, 311.

⁶ *S. v. Asher*, 50 Ark. 427, 8 S. W. 177; *S. v. Garris*, 98 N. C. 733, 4 S. E. 633. See also: *Crocker v. S.*, 49 Ark. 60, 4 S. W. 197; *Bruce v. S.*, 87 Ind. 450; *S. v. Cox*, 65 Mo. 29; *S. v. Schaffer*, 31 Wash. 305, 71 P. 1088.

⁷ *Reg. v. Hennah*, 13 Cox C. C. 547, C. 111.

⁸ *Rex v. Richardson*, Leach, 4th ed. 387; *Pinkard v. S.*, 30 Ga. 757, M. 335.

nal;¹ so with a guest who enters the hotel with the consent of the landlord;² the doctrine of trespass *ab initio* has no place in the criminal law. So a master cannot, by adopting the criminal act of his servant, thereby make himself indictable therefor.³ Similarly, a former intent and act, colorless in themselves, cannot be made criminal by the occurrence of a subsequent event not necessarily connected therewith or caused thereby.⁴ But if the intent exists at the time of the criminal act, it is immaterial that it no longer exists when the results of that act, which settle the nature of the offence, are finally determined. Thus where A, in a criminal state of mind, stabs B, he is none the less criminally responsible for the latter's death if he repents of his act between the time of the blow and the death.⁵ And it would seem that if A, instead of stabbing B, had, with the same intent, set in motion a chain of events that (without the intervention of any criminally responsible third person) produced this same result as their natural and proximate consequence, a change of intent after the setting in motion of the chain of causation would be immaterial.⁶

THE CRIMINAL ACT.

§ 6. **Difference between Wrong and Crime.** — Not every act which is legally wrong is a crime. Private wrongs are redressed by suits *inter partes*. In a criminal prosecution the government itself is a party; and the government moves only when the interest of the public is involved. The basis of criminality is therefore the effect of the act complained of upon the public.⁷

§ 7. **Moral Obliquity not Essential.** — It follows from this

¹ *Milton v. S.*, 40 Fla. 251, 24 So. 60, M. 334; *C. v. Tobin*, 108 Mass. 426.

² *S. v. Moore*, 12 N. H. 42, M. 918.

³ *Morse v. S.*, 6 Conn. 9. See also *post*, § 280.

⁴ *U. S. v. Fox*, 95 U. S. 670.

⁵ Compare *Reg. v. Sutton*, 2 Moo. C. C. 29, M. 335.

⁶ Compare *S. v. Stentz*, 33 Wash. 444, 74 P. 588; 1 Bish. New. Cr. L., § 207.

⁷ *Rex v. Wheatly*, 2 Burr. 1125.

that moral obliquity is not an essential element of crime, except so far as it may be involved in the very fact of the violation of law. What, therefore, is criminal in one jurisdiction may not be criminal in another; and what may be criminal at a particular period is often found not to have been criminal at a different period in the same jurisdiction. The general opinion of society, finding expression through the common law or through special statutes, makes an act to be criminal or not according to the view which it takes of the proper means of preserving order and promoting justice. Adultery is a crime in some jurisdictions; while in others it is left within the domain of morals. Embezzlement, which was till within a comparatively recent period a mere breach of trust, cognizable only by the civil courts, has been nearly, if not quite, universally brought by statute into the category of crimes as a modified larceny. The sale of intoxicating liquors is or is not a crime, according to the differing views of public policy entertained by different communities.

§ 8. **Trifling Offences not Indictable.**—Some violations of legal duty are said to be so trifling in their character, or of such exclusive private interest, that the law does not notice them at all, or leaves them to be dealt with by the civil tribunals.¹

§ 9. **Three Classes.**—Crimes are classified as *treasons*, *felonies*, and *misdemeanors*, the former being regarded as the highest of crimes, and punished in the most barbarous manner, as it is a direct attack upon the government, and disturbs the foundations of society itself. It is primarily a breach of the allegiance due from the governed to the government. It is active disloyalty against the State; and because it is against the State, it is sometimes called *high* treason, in contradistinction to *petit* treason, which, under the early English law, was the killing of a superior toward whom some duty of allegiance is due from an inferior,—as where a servant killed his master, or an ecclesiastic his lord or ordinary. Now, however, this distinction is done away with both in this

¹ *Rex v. Southerton*, 6 East, 126; see *Reg. v. Kenrick*, per Ld. Denman, 5 Q. B. 62, in commenting upon *Rex v. Turner*, 13 East, 228.

country and in England, and such offences belong to the category of homicide.¹

§ 10. **Felonies** at common law were such crimes as upon conviction involved the forfeiture of the convict's estate.² They were also generally, but not always, punishable with death. These tests have long since been abolished in England, and what constitutes felony is now, to a great extent, both there and in this country, determined by statutory regulation. If the statute either expressly³ or by clear implication,⁴ as by punishing accessories, a distinction applicable only to felonies,⁵ or by using a word that has a settled common law meaning, as robbery,⁶ fixes the degree of crime, that of course is conclusive. Whenever this is not the case, the courts look to the history of the particular offence under consideration, and ascertain whether it was or was not regarded by the common law as a felony.⁷ The more usual statutory test in this country is that the offence is punishable with death, or imprisonment in the state prison.⁸ The term is now significant only as indicating the "degree or class" of the crime committed.⁹ What was felony at common law, unless the statute has interposed and provided otherwise, is still regarded as felony in all the States of the Union, with the possible exception of Vermont,¹⁰ without regard to the ancient test or to the mode of punishment.

¹ 4 Bl. Com. 75, 92.

² 4 Bl. Com. 94.

³ *Reagan v. U. S.*, 157 U. S. 301; compare *U. S. v. Staats*, 8 How. 41.

⁴ *S. v. Mallett*, 125 N. C. 718, 34 S. E. 651.

⁵ *C. v. Barlow*, 4 Mass. 439.

⁶ *Harrison v. U. S.*, 163 U. S. 140. See also on the U. S. criminal law *U. S. v. Coppersmith*, 4 Fed. 198; *Considine v. U. S.*, 112 Fed. 342; *U. S. v. Vigil*, 7 N. M. 269, 34 P. 530.

⁷ *Drennan v. P.*, 10 Mich. 169; *S. v. Drew*, 65 N. C. 572; *S. v. Murphy*, 17 R. I. 698, 24 Atl. 473.

⁸ 1 Bish. Cr. Law, § 618. And it is none the less a felony because a milder punishment may be imposed; 1 Bish. Cr. Law, § 619, and cases. See also: *Mairs v. B. & O. R. R.*, 73 App. Div. (N. Y.) 265, 76 N. Y. S. 838; *S. v. Hamilton*, 2 O. C. D. 6. Compare *P. v. Cornell*, 16 Cal. 187.

⁹ 1 Russ. on Crimes, 40.

¹⁰ *S. v. Scott*, 24 Vt. 127.

§ 11. **Misdemeanors** include all other crimes, of whatever degree or character, not classed as treasons or felonies, and however otherwise punishable.¹ It is for the most part descriptive of a less criminal class of acts. But there are undoubtedly some misdemeanors which involve more turpitude than some felonies, and may, for this reason, be visited with greater severity of punishment, though not of the same kind. What was not felony by the common law, or is not declared to be by statute, or does not come within the general statutory definitions, is but a misdemeanor, though, in point of criminality, it may be of a more aggravated character than other acts which the law has declared to be felony.² When a question arises whether a given crime is a felony or a misdemeanor, and the question is at all doubtful, the doubt ought to be resolved in favor of the lighter offence³ in conformity to the rule of interpretation in criminal matters, that the defendant shall have the benefit of a doubt.

§ 12. **What Acts Are Criminal.**—For reasons that we have already stated, it is impossible to draw an exact line between offences that are criminal and those which are mere civil wrongs; nor is an exact classification of all criminal acts possible. The more important crimes, including felonies, are clearly defined; but the lesser offences can neither be exhaustively described nor even named. Only the general principles can be stated, and it must be left to the court to apply these principles to the facts of each particular case as it arises.⁴ Much of the difficulty is removed by statutes, which commonly define such minor offences as are likely to arise. Many of the smaller common law offences are comprised under the crimes of nuisance, malicious mischief, and conspiracy.

§ 13. **Offences against the Government.**—Offences of a sort to affect the public collectively, that is to interfere with the proper maintenance of the different departments of the government, are criminal acts. Thus the embezzlement of

¹ 1 Russ. on Crimes, 43.

² C. v. Newell, 7 Mass. 245.

³ C. v. Barlow, 4 Mass. 439.

⁴ C. v. Callaghan, 2 Va. Cas. 460, C. 6.

public moneys¹ and the destruction of trees upon public land² are indictable offences; as are the disturbance of a town meeting,³ and fraudulent voting at a town election;⁴ so also the stirring up of disaffection against the government,⁵ or slanderous⁶ or libellous⁷ attacks upon its officers. Corruption in public office is criminal, whether the office be executive⁸ or judicial;⁹ and it is equally a criminal act to interfere, as by bribery,¹⁰ or subornation of perjury,¹¹ with the execution of the duties of any department of government. And an indictment will lie for a failure by a public officer to discharge the duties devolved upon him by law.¹²

§ 14. **Offences against Public Security and Tranquillity.** — The government protects not only itself, but the health, security, and tranquillity of the public at large; and an act which endangers either of these is a criminal act. Thus, knowingly exposing a small-pox patient in the public street, so as to endanger the public,¹³ driving a carriage through a crowded street at a dangerous rate,¹⁴ keeping explosive substances in a town, so as to create danger of an explosion,¹⁵ openly carrying about a dangerous weapon, so as to alarm the public,¹⁶ spreading false

¹ *Resp. v. Teischer*, 1 Dall. (Pa.) 335.

² *C. v. Eckert*, 2 Browne (Pa.), 249.

³ *C. v. Hoxey*, 16 Mass. 385.

⁴ *C. v. Silsbee*, 9 Mass. 417; *C. v. McHale*, 97 Pa. 407, M. 27.

⁵ *Anon.*, 3 Mod. 52, M. 21; *C. v. Morrisson*, Addison (Pa.), 274, M. 22.

⁶ *Anon.*, Comberbach, 46; *Rex v. Darby*, 3 Mod. 139, M. 21.

⁷ *Reg. v. Lovett*, 9 C. & P. 462; *S. v. Burnham*, 9 N. H. 34.

⁸ *C. v. Callaghan*, 2 Va. Cas. 460, C. 6.

⁹ *Rex v. Williams*, 3 Burr. 1317, M. 23; *P. v. Coon*, 15 Wend. (N. Y.) 277.

¹⁰ *Reg. v. Bunting*, 7 Ont. 524; *S. v. Ellis*, 33 N. J. L. 102, M. 23.

¹¹ 1 Hawk. P. C., c. 69, § 10.

¹² *Gearhart v. Dixon*, 1 Pa. St. 224 (*semble*); *S. v. Hall*, 97 N. C. 474, 1 S. E. 683.

¹³ *Rex v. Vantandillo*, 4 M. & S. 73, M. 53; *Rex v. Burnett*, 4 M. & S. 272; *Reg. v. Henson*, Dears. 24.

¹⁴ *U. S. v. Hart*, 1 Pet. C. C. 390, Fed. Cas. No. 15,316.

¹⁵ *Reg. v. Lister*, D. & B. 209; *Rex v. Taylor*, 2 Str. 1167, M. 52; *contra*, *Kleebeaur v. Fuse Co.*, 138 Cal. 497, 71 P. 617; *P. v. Sands*, 1 Johns. (N. Y.) 78.

¹⁶ *Knight's Case*, 3 Mod. 117; *S. v. Huntly*, 3 Ired. (N. C.) 418.

reports that children are being kidnapped,¹ making outcries on the public street, in such a way as to annoy passers,² obstructing a navigable stream³ or a public highway,⁴ or failing to keep the same in repair,⁵ displaying an effigy with the intent of causing a riot,⁶ are all indictable acts.⁷

§ 15. **Offences against Religion, Morality, and Decency.** — Offences against religion, morality, and decency are criminal if they are committed publicly, or in such a way as to affect the public. Thus, disturbing public worship is a criminal act;⁸ so is blasphemy or profane swearing in public.⁹ Public obscenity in word¹⁰ or action¹¹ is criminal. But since it is only affronts to the public sense of decency that the criminal law attempts to guard against and not the injury to the individual as such, an indecent exposure to one person is not a crime;¹² but on the other hand, it is not necessary that the exposure should have been seen by more than one person if it

¹ *C. v. Cassidy*, 6 Phila. 82, M. 54.

² *C. v. Oaks*, 113 Mass. 8.

³ *Reg. v. Randall*, C. & M. 496; *Resp. v. Caldwell*, 1 Dall. (Pa.) 150; *S. v. Church*, 1 Pa. St. 105.

⁴ *C. v. Wilkinson*, 16 Pick. (Mass.) 175; *Reading v. C.*, 11 Pa. St. 196; *Town of Mason v. O. R. R. C.*, 51 W. Va. 183, 41 S. E. 418.

⁵ *Waterford v. P.*, 9 Barb. (N. Y.) 161; *S. v. Murphreesboro*, 11 Humph. (Tenn.) 217.

⁶ *C v. Haines*, 4 Clark (Pa.), 17, M. 41; compare *Beatty v. Gilbanks*, 15 Cox C. C. 138.

⁷ For other instances of acts which are indictable as injuring the public security and tranquillity see: *Rex v. Dixon*, 3 M. & S. 11; *Stein v. S.*, 37 Ala. 123; *S. v. Hart*, 34 Me. 36; *C. v. Chapin*, 5 Pick. (Mass.) 192; *S. v. Williams*, 2 Overt. (Tenn.) 108, M. 63; *post*, §§ 178-183.

⁸ *S. v. Jasper*, 4 Dev. (N. C.) 323.

⁹ *Goree v. S.*, 71 Ala. 7; *P. v. Ruggles*, 8 Johns. (N. Y.) 290, M. 36; *S. v. Powell*, 70 N. C. 67; *S. v. Brewington*, 84 N. C. 783; *Young v. S.*, 10 Lea (Tenn.), 165.

¹⁰ *S. v. Appling*, 25 Mo. 315; *S. v. Toole*, 106 N. C. 736, 11 S. E. 168; *Barker v. C.*, 19 Pa. 412; *Bell v. S.*, 1 Swan (Tenn.), 42, M. 59.

¹¹ *Sedley's Case*, 1 Keb. 620; *Reg. v. Reed*, 12 Cox C. C. 1; *S. v. Rose*, 32 Mo. 560; *Britain v. S.*, 3 Humph. (Tenn.) 203.

¹² *Reg. v. Watson*, 2 Cox C. C. 376; *Reg. v. Webb*, 2 C. & K. 933; *Morris v. S.*, 109 Ga. 351, 34 S. E. 577.

was so publicly done that it might well have been.¹ An indictment will lie for maintaining an indecent public exhibition,² or for knowingly leasing premises to be used for immoral purposes,³ or conducting a disorderly house.⁴ Open public cohabitation of a man and woman without marriage is criminal,⁵ though a secret cohabitation is not.⁶ Common public drunkenness is indictable,⁷ and so, it has been held, is public cruelty to animals.⁸ And casting a human corpse into a river is criminal, being an outrage on the public feeling of decency.⁹ So the exhuming of a body for purposes of dissection.¹⁰ In short, whatever tends to the corruption of the public morals is a criminal act;¹¹ for the court, in administering the criminal law, is *custos morum populi*.¹²

§ 16. **Offences against Individuals.** — The greatest difficulty arises in connection with offences against the persons or property of individuals. So far as the party injured is con-

¹ *Reg. v. Thallman*, L. & C. 326; *S. v. Roper*, 1 Dev. & Batt. (N. C.) 208. Compare *C. v. Oaks*, 113 Mass. 8.

² *Reg. v. Grey*, 4 F. & F. 73; *Reg. v. Saunders*, 1 Q. B. D. 15; *Pike v. C.*, 2 Duv. (Ky.) 89; *C. v. Sharpless*, 2 S. & R. (Pa.) 91.

³ *Smith v. S.*, 6 Gill (Md.), 425; *C. v. Harrington*, 3 Pick. (Mass.) 26.

⁴ *Rex v. Medlor*, 2 Show. 36; *U. S. v. Dixon*, 4 Cranch C. C. 107, Fed. Cas. No. 14,970; *accord*, *Hall v. S.*, 4 Harr. (Del.) 132; *S. v. Mulliken*, 8 Blackf. (Ind.) 260. Compare *Rex v. M'Donald*, 3 Burr. 1645; *P. v. Jackson*, 3 Den. (N. Y.) 101.

⁵ *Rex v. Delaval*, 3 Burr. 1434; *S. v. Cagle*, 2 Humph. (Tenn.) 414.

⁶ *Crouse v. S.*, 16 Ark. 566; *P. v. Gates*, 46 Cal. 52; *Ex parte Thomas*, 103 Cal. 497, 37 P. 514; *Wright v. S.*, 5 Blackf. (Ind.) 358; *Delany v. P.*, 10 Mich. 241; *S. v. Moore*, 1 Swan (Tenn.), 136; *S. v. Cooper*, 16 Vt. 551. Compare *S. v. Brunson*, 2 Bail. (S. C.) 149; *C. v. Isaacs*, 5 Rand. (Va.) 634; *Jones' Case*, 2 Grat. (Va.) 555; *contra*, *S. v. Avery*, 7 Conn. 266, (*semble*); *Grisham v. S.*, 2 Yerg. (Tenn.) 589.

⁷ *Tipton v. S.*, 2 Yerg. (Tenn.) 542.

⁸ *U. S. v. Logan*, 2 Cr. C. C. (D. C.) 259, Fed. Cas. No. 15,623; *U. S. v. Jackson*, 4 Cr. C. C. (D. C.) 483, Fed. Cas. No. 15,453. See Anon., 7 Dane Abr. 261.

⁹ *Kanavan's Case*, 1 Me. 226.

¹⁰ *Rex v. Lynn*, Leach, 4th ed. 497. Compare *Reg. v. Price*, L. R. 12 Q. B. D. 247.

¹¹ *C. v. Sharpless*, 2 S. & R. (Pa.) 91.

¹² *Rex v. Delaval*, 3 Burr. 1434. See also *S. v. Dowers*, 45 N. H. 543.

cerned, his wrong is righted by a civil action. The public is not called upon to interfere, so long as an injury is private; nor can a plaintiff be allowed to turn a declaration into an indictment.¹ The question to be settled in all cases of the sort, therefore, is this: Has the public security been endangered by the offence? In all cases where the public peace has been endangered there is clearly a criminal offence; and this principle covers all cases of violence to the person. It covers also all cases where the personal safety of an individual is threatened; for the public is bound to protect the personal safety of its individual members. So an act, though it fall short of personal violence, is criminal if its natural effect is to cause serious personal injury. Infecting drinking-water by throwing the carcass of an animal into a well is criminal for this reason;² as is putting cow-itch on a towel in order to communicate the disease to a person using the towel.³ Entering a house at night and disturbing the inmates so that a woman therein was made ill has been held indictable.⁴ It was also held a criminal act to come into the porch of a house where only women were, and shoot dogs lying in the yard, so as to cause great fright to the women.⁵ And where the defendant was shooting wild fowl near a house, and a girl in the house was thrown into fits at the sound of a gun, but the defendant, though warned of this fact, wantonly discharged the gun and injured the girl, he was held guilty of a criminal act.⁶

§ 17. **Offences against Property.** — The public is not, generally speaking, concerned with transactions between individuals, or interested in protecting private property from spoliation. Forceful acts of depredation are violations of the public peace; therefore forcible entry on land, and robbery of chattels, are criminal. It is also the duty of the public to protect

¹ *Rex v. Osborn*, 3 Burr. 1697.

² *S. v. Buckman*, 8 N. H. 203.

³ *P. v. Blake*, 1 Wheel. (N. Y.) 490.

⁴ *C. v. Taylor*, 5 Binn. (Pa.) 277.

⁵ *Henderson v. C.*, 8 Grat. (Va.) 703.

⁶ *C. v. Wing*, 9 Pick. (Mass.) 1.

individuals when they cannot protect themselves, as during sleep. In the performance of this duty, the criminal law forbids breach of a man's dwelling in the night-time, or burning it at any time, and the taking of his chattels from his possession against his will; these acts constituting the crime of burglary, arson, and larceny. But where a man is in condition to protect himself, he is not generally afforded the additional protection of the criminal law. Accordingly, cheating is not generally criminal, but it becomes so if accomplished by means of false weights, measures, or tokens, against which a man cannot protect himself, or by a corrupt combination of two or more persons, by which the most careful man might be deceived.¹ For a similar reason, it is not criminal at common law to convert to one's own use goods of another, of which one has the possession; for it is merely a breach of the trust imposed by the owner, who has thus had an opportunity to protect himself. These acts have, however, been made criminal by statutes, and now constitute respectively the crimes of obtaining by false pretences, and embezzlement.

Real property is at common law accorded even less protection by the public than chattels; probably because the danger of depredation is less, and the public interest is therefore involved to a less degree. No trespass on real property which falls short of forcible entry is criminal.² Many injuries to real property have been made criminal by statute.

§ 18. **Attempts.** — An attempt is an act done in part ex-

¹ *Rex v. Wheatly*, 2 Burr. 1125, 1 W. Bl. 273; *C. v. Warren*, 6 Mass. 72. The reason for the distinction is perhaps rather in the fact that the cheating by means of a false token is an act more directly affecting the public since it may be used against all its members indifferently. A cheating by a forged letter directed to a single individual may be as effective in deceiving him as would be a false weight, yet it would not be punishable as a cheating by false tokens: *P. v. Stone*, 9 Wend. (N. Y.) 182; *Middleton v. S.*, Dudley (S. C.), 275, M. 57. Compare *Resp. v. Powell*, 1 Dall. (Pa.) 47, M. 56; and *ante*, § 13.

² *Rex v. Storr*, 3 Burr. 1698; *Rex v. Atkins*, 3 Burr. 1706; *Brown's Case*, 3 Me. 177; *S. v. Burroughs*, 7 N. J. L. 426; *Kilpatrick v. P.*, 5 Denio (N. Y.), 277; *C. v. Edwards*, 1 Ashm. (Pa.) 46; *C. v. Powell*, 8 Leigh (Va.), 719.

ecution of a design to commit a crime.¹ There must be an intent that a crime shall be committed, and an act done, not in full execution, but in pursuance, of the intent.² An attempt to commit a crime, whether common law or statutory, is in itself a crime, — usually a misdemeanor, unless expressly made a felony by statute.³ But if the act, when accomplished, would be a violation of neither statute nor common law, — as, for instance, the procuring an abortion with the consent of the mother, she not being then quick with child, — the attempt is no crime.⁴

§ 19. **Solicitations and Misprisions.** — A solicitation to commit a crime is not an attempt, being a mere act of preparation ; and a solicitation to commit a small crime is not regarded as of enough public importance to be punished as a crime.⁵ But solicitation to commit a felony or other aggravated crime is a criminal act ;⁶ and for this purpose any act which tends to a breach of the peace, or a corruption of public justice or duty, is a sufficiently aggravated crime.⁷

Misprision of felony, that is, the concealment of the commission of a felony, is a criminal act.⁸ A similar neglect to prevent or disclose the commission of a treason is misprision of treason.⁹ All misprisions are misdemeanors, and a misprision of a misdemeanor is too trifling an offence for the criminal law to take cognizance of.

§ 20. **Failure of the Criminal Act.** — It is evident that, however criminal the intent of a party, if his act failed to become a criminal one, he cannot be convicted of crime. Thus, if

¹ *Smith v. C.*, 54 Pa. 209.

² *Rex v. Wheatly*, 2 Burr. 1125, 1 B. & H. Lead. Cr. Cas. 1, and note.

³ *Reg. v. Meredith*, 8 C. & P. 589 ; *Rex v. Roderick*, 7 C. & P. 795 ; *Smith v. C.*, *ante*.

⁴ *C. v. Parker*, 9 Met. (Mass.) 263 ; *S. v. Cooper*, 2 Zab. (N. J.) 52. See *post*, §§ 183-185.

⁵ *Cox v. P.*, 82 Ill. 191 ; *Smith v. C.*, *ante*.

⁶ *Rex v. Higgins*, 2 East, 5 ; *C. v. Flagg*, 135 Mass. 545 ; *C. v. Randolph*, 146 Pa. 83, 33 Atl. 388.

⁷ Whart. Cr. Law, § 179 ; *Walsh v. P.*, 65 Ill. 53.

⁸ 1 Hawkins P. C., ch. vii.

⁹ Hale P. C. 484 ; 1 East P. C. 139.

one takes his own watch *animo furandi*, thinking it to be another's, he cannot be convicted of larceny. And where A. obtained property by the conveyance of land, which he represented as unencumbered, though he believed there was an encumbrance on it, yet if the encumbrance was invalid he is not guilty of obtaining by false pretences.¹

§ 21. **Effect of Individual Action.** — In certain classes of criminal acts, — offences, namely, against the persons or property of individuals, — the injury is done primarily to the individual; and the act is a criminal one only because it is for the public interest to protect individuals against such offences. In crimes of this kind the consent of the individual injured becomes a factor in determining the criminality of the defendant's act, not because the individual can authorize the defendant to commit a crime, but because, if the act is one that is criminal only if done without the consent of the individual, as battery, which is unpermitted bodily contact, or larceny, which is taking of property without the consent of the owner, the existence of the consent takes away one of the elements necessary to make out the crime.

§ 22. **Effect of Acquiescence for Detection.** — It is necessary, however, to distinguish between a consent by the individual that a certain thing might be done to him or his property, which, if it had been done without his consent, would have been criminal, and mere knowledge by him that a wrong doer intended to commit such an act. In the latter case where the injured individual afforded an opportunity for the commission of a criminal act for the sake of detecting the criminal, the acquiescence of the individual, such as it is, does not prevent the act from being punishable.² Thus, where a thief proposed to A's servant to steal A's property, and the servant, having informed A, was ordered to proceed in the act proposed, and thereupon the act was committed and the thief apprehended

¹ *S. v. Asher*, 50 Ark. 427, 8 S. W. 177.

² *Reg. v. Williams*, 1 C. & K. 195; *P. v. Hanselman*, 76 Cal. 460, 18 P. 425; *O'Halloran v. S.*, 31 Ga. 206; *S. v. Anone*, 2 N. & McC. (S. C.) 27; *Alexander v. S.*, 12 Tex. 540.

upon the spot, he was held to be guilty of larceny.¹ So where A proposed to sell liquor to B's slaves, contrary to the statute, knowledge thereof and acquiescence therein by B constituted no defence;² so with putting an obstruction on a railroad track, acquiesced in by the company for the purpose of detecting the criminal.³ And so long as the injured person gives no consent to the act proposed, the fact that he hopes that the criminal may make the attempt in order that he may be caught does not lessen the criminality of the act. Nor is it the less a crime because the person to be robbed makes full preparation therefor, and has officers or detectives stationed to apprehend the criminals.⁴ But it must be plain that the act was in no sense induced by the injured party; for if he was active in the commission of the offence, it is his own act, and no injury to him. If the individual is not harmed, there is no public injury.⁵

The distinction is brought out clearly in two cases stated in Foster's Crown Law. In the first case, one procured himself to be robbed by strangers, that he might apprehend them and gain the reward; and this was held no crime.⁶ In the second, one went out on the highway and put himself in the way of being robbed, with the intention of capturing the highwayman; and here the robbery was held to be a crime.⁷ And this distinction is the same whether the procuring of the act and consequent consent thereto is done personally, or by those who represent the owner of the property. Thus where

¹ *Rex v. Eggington*, 2 East P. C. 494, 666, 2 B. & P. 508, C. 326, K. 260; *Varner v. S.*, 72 Ga. 745; *Thompson v. S.*, 18 Ind. 386; *S. v. Sneff*, 22 Neb. 481, 35 N. W. 219; *S. v. Covington*, 2 Bailey (S. C.), 569, M. 77; *McAdams v. S.*, 76 Tenn. 456; *Robinson v. S.*, 34 Tex. Cr. R. 71, 29 S. W. 40.

² *O'Halloran v. S.*, 31 Ga. 206.

³ *Dalton v. S.*, 113 Ga. 1037, 39 S. E. 468.

⁴ *S. v. Stickney*, 53 Kan. 308, 36 P. 714; *Johnson v. S.*, 3 Tex. App. 590; *P. v. Morton*, 4 Utah, 407, 11 P. 512.

⁵ *Rex v. Eggington*, 2 East P. C. 666, C. 326, K. 260; *S. v. Douglass*, 44 Kan. 618; *P. v. McCord*, 76 Mich. 200, 42 N. W. 1106; *S. v. Adams*, 115 N. C. 775, 20 S. E. 722.

⁶ *McDaniel's Case*, Fost. C. L. 121, K. 259.

⁷ *Norden's Case*, Fost. C. L. 129.

A employs a detective to discover a wrong doer and the detective with the consent of A urges the person suspected to steal again in order to get a conviction, the consent of the owner through his agent will prevent the act done from being a crime.¹ The same principle of course applies where the physical act of taking is done by the detective.²

A somewhat common case is where the servant of the person whose house it is designed to enter is approached, and, by advice of the master, consents to assist the burglars, his purpose being to secure their arrest and conviction. If in such a case the servant himself opens the door for the thieves, the latter cannot be held guilty of burglary; at most their offence is larceny.³

§ 22a. **Acts Induced by Third Persons.** — It is clear that the criminality of crimes of the kind discussed in the last section can be taken away only by the consent of a person injured or those who represent him. Hence where a third person induces the defendant to rob for the purpose of apprehending him in his crime, no consent by him, express or implied, can excuse the defendant.⁴ *A fortiori* is this the case where the act is criminal because it directly injures the public at large or the government. Thus, in an indictment for sending obscene matter through the mails, it is no defence that it was sent in answer to a request so to do made to the defendant by a post-office inspector, who did it for the purpose of getting evidence to convict him.⁵ If, however, the act is criminal only when done in a certain way, as liquor selling without the

¹ Connor v. P., 18 Col. 373, 33 P. 159; S. v. Waghalter, 177 Mo. 676, 76 S. W. 1028; Spieden v. S., 3 Tex. App. 156, M. 80; McGee v. S., Tex. , 66 S. W. 562.

² P. v. Collins, 53 Cal. 185; Williams v. S., 55 Ga. 391; Love v. P., 160 Ill. 501, 43 N. E. 710.

³ Rex v. Eggington, 2 East P. C. 666, C. 326, K. 260; S. v. Jansen, 22 Kan. 498; S. v. Hayes, 105 Mo. 76, 16 S. W. 514.

⁴ S. v. Abley, 109 Ia. 61, 80 N. W. 225, M. 83; P. v. Liphardt, 105 Mich. 80, 62 N. W. 1022. The person so instigating may himself be also criminally liable: Slaughter v. S., 113 Ga. 284, 38 S. E. 854.

⁵ Price v. U. S., 165 U. S. 311; Rosen v. U. S., 161 U. S. 29; U. S. v. Wight, 38 Fed. 106; U. S. v. Dorsey, 40 Fed. 752; *contra*, U. S. v. Adams, 59 Fed. 674.

license of the municipality, the effect of consent given indirectly by the solicitation of a detective employed by the city, would be sufficient to render the act non-criminal.¹ But here, too, the distinction between solicitation and acquiescence for detection must be kept in mind.²

§ 23. **Effect of Consent.** — Consent on the part of the individual to the act complained of will generally prevent the act from being a crime, provided the consent is not exceeded. If, however, the act exceeds the consent, the defendant is clearly liable. Thus in cases of assault and battery, if consent is given to one act and the defendant does another, or if the act consented to is done maliciously and with a degree of force exceeding that consented to, the crime is completed.³

There are, moreover, certain cases where the law forbids, or rather makes void, consent; and in such cases the consent will not avail the offender. A young girl, for instance, cannot give a valid consent to carnal connection.⁴ The age at which she becomes capable of consenting is generally fixed by statute.

If the consent is to an act which may cause serious bodily harm, it is clearly void;⁵ for such harm is of itself a public injury. Thus in an indictment for mayhem⁶ or homicide⁷ the consent of the injured party is no defence. On the other hand, innocent, manly sports are to be encouraged, and injury which results in the course of such sports, fairly and honestly carried on, cannot be the basis of a criminal prosecution. But sports which are likely to cause serious injury or breach of the peace are not regarded as lawful; and where a criminal

¹ *Wilcox v. P.*, 17 Col. App. 109, 67 P. 343; *P. v. Braisted*, 13 Col. App. 532, 58 P. 796; *Evanston v. Myers*, 172 Ill. 266, 50 N. E. 204, M. 88; *Blaikie v. Linton*, 18 Scot. Law Rep. 583.

² *Evanston v. Myers*, *ante*.

³ *Reg. v. Sinclair*, 13 Cox C. C. 28; *Reg. v. Bennett*, 4 F. & F. 1105; *Reg. v. Clarence*, 16 Cox C. C. 511, M. 514; *S. v. Richie*, 58 Ind. 355.

⁴ *P. v. Gordon*, 70 Cal. 467, 11 P. 762; and see cases under Assault with Intent.

⁵ *Reg. v. Bradshaw*, 14 Cox C. C. 83, K. 131.

⁶ *Wright's Case*, Co. Litt. 127 a.

⁷ *Rex v. Sawyer*, 1 Russ. Cr. & Mis., 5th ed. 645.

prosecution is founded upon an injury inflicted in the course of such sports, the consent of the injured party is no defence.¹

§ 23a. **Condonation.**— While, as pointed out above,² the consent of the individual may, under certain circumstances, prevent the act done from being a crime, if the defendant once does an act that the law forbids, a later condonation by the individual injured can have no effect on the criminal liability of the wrong doer. In the criminal prosecution the public is concerned, and not the injured individual; consequently, if the elements of crime are present, the public cannot be affected by any act of the individual. Thus, no forgiveness by the injured party,³ or restitution by the offender, can affect the public right to punish the offence;⁴ nor can any act of the injured individual before the offence is consummated prevent a conviction, provided the elements of crime are present.

The statutory offence of seduction under promise of marriage illustrates this distinction. By the weight of decision the gravamen of the offence is the breach of the promise to marry when accompanied by seduction: on this view, if the parties marry after the seduction, the defendant is not criminally liable, because one of the elements of the crime is lacking.⁵ On the other hand, the statute has been construed as being aimed against seduction accomplished under such a promise; on this view the crime is completed when the seduction takes place and subsequent marriage is no defence.⁶

¹ Foster's C. L. (3d ed.) 259; Reg. v. Bradshaw, *ante*; Reg. v. Coney, 8 Q. B. D. 534, M. 70; C. v. Collberg, 119 Mass. 350, C. 160; S. v. Underwood, 57 Mo. 40; S. v. Burnham, 56 Vt. 445.

² §§ 21, 23.

³ C. v. Slattery, 147 Mass. 423, 18 N. E. 399; S. v. Hammond, 77 Mo. 157.

⁴ Thus in embezzlement: Fleener v. S., 58 Ark. 98, 23 S. W. 1; Thalheim v. S., 38 Fla. 169, 20 So. 938; S. v. Frisch, 45 La. Ann. 1283, 14 So. 132; Truslow v. S., 95 Tenn. 189, 31 S. W. 987; false pretences: Williams v. S., 105 Ga. 606, 31 S. E. 546, M. 100; forgery: S. v. Tull, 119 Mo. 421, 24 S. W. 1010; Countee v. S., Tex., 33 S. W. 127. See also C. v. Kennedy, 160 Mass. 312, 35 N. E. 1131.

⁵ S. v. Otis, 135 Ind. 267, 34 N. E. 954; P. v. Gould, 70 Mich. 240, 38 N. W. 232; C. v. Eichar, 4 Pa. Law J. 326. Compare S. v. Horton, 100 N. C. 443, 6 S. E. 238.

⁶ *Re* Lewis, 67 Kan. 562, 73 P. 77. Compare P. v. Hough, 120 Cal.

§ 23*b*. **Condonation by Public Officers.** — A somewhat similar question arises where the prosecuting attorney or other officer of the State attempts to release a defendant from his criminal responsibility if he will give evidence against his co-defendants or confederates. Here too the attempted condonation cannot excuse the crime; it is still the same and the State still has the right to punish therefor. If, however, the defendant faithfully performs his side of the agreement and the proceeding takes place with the approval of the judge before whom the matter is pending, this is recognized as giving him a moral right to consideration by the State,¹ and he is given time to apply for a pardon, or a *nol. pros.* is entered, or other similar steps taken.² In some jurisdictions such agreement may, by statute, be set up as a plea in bar.³

§ 23*c*. **Compounding Crimes.** — Not only can the condonation by the individual injured have no effect upon the wrong doer's criminal liability, as has been already pointed out, but if the former enters into an agreement with the wrong doer not to prosecute, he thereby commits a separate criminal offence, viz. compounding.⁴ The offence compounded must have been itself a crime; otherwise it is simply a settlement of private claims.⁵ The gist of the offence lies in the agreement not to

535, 52 P. 846; *S. v. Bierce*, 27 Conn. 319; *S. v. Wise*, 32 Or. 280, 50 P. 800.

¹ *Rex v. Rudd*, Cowp. 331; *C. v. St. John*, 173 Mass. 566, 54 N. E. 254, M. 105; *Whitney v. S.*, 53 Neb. 287, 73 N. W. 696; *S. v. Graham*, 41 N. J. L. 15; *S. v. Lyon*, 81 N. C. 600; *U. S. v. Ford*, 99 U. S. 594. See *S. v. Bain*, 112 Ind. 335, 14 N. E. 232.

² For the various methods of procedure see 1 Bish. New Cr. Pr., §§ 1164-1168.

³ *P. v. Peter*, 48 Cal. 250; *Young v. S.*, Tex., 75 S. W. 23.

⁴ A particular form of compounding which consists in receiving back stolen goods under an agreement not to prosecute was called *thef bote* in the older law, and the person so taking back his goods was punished as an accessory after the fact to the robbery. It is now regarded as a separate misdemeanor: 4 Bl. Com. 133; and see *S. v. Vidalla*, 24 R. I. 186, 52 Atl. 889.

⁵ *Treadwell v. Torbert*, 122 Ala. 297, 25 So. 216; *Woodham v. Allen*, 130 Cal. 194, 62 P. 398; *Keith v. Buck*, 16 Ill. App. 121; *S. v. Leeds*, 68 N. J. L. 210, 52 Atl. 288; *S. v. Hanson*, 69 N. J. L. 42, 54 Atl. 841;

prosecute, and once the agreement has thus been made the crime is completed;¹ hence it is no defence that the compounder later instituted criminal proceedings against the original wrong doer.² On the other hand, if the injured person merely accepts restitution from the wrong doer, but makes no agreement as to criminal proceedings, there is no compounding.³

Since the criminality of the act lies in the fact that it is done for the purpose of settling by individual action a matter in which the State is the party primarily interested, it follows that the offence is none the less committed, whether the crime compounded be a treason, or a felony,⁴ or a misdemeanor such as disturbing public worship,⁵ or a riot,⁶ or illegal liquor selling.⁷ Where, however, the crime is at most a slight one, and where, in addition to that, the criminality of it lies principally in the injury to some individual, the law will allow the party thus directly injured to settle the matter by agreement. Thus a charge of obtaining money by false pretences,⁸ or of assault and battery,⁹ or of fornication,¹⁰ may be thus settled. In many States statutes have been passed defining this right.¹¹

§ 24. **Effect of Contributory Negligence.** — Though the negligence of the injured party contributed to the injury, the defendant is none the less punishable; for the injury was

Swope v. Ins. Co., 93 Pa. 251; *Heckman v. Swartz*, 50 Wis. 267, 6 N. W. 891; *contra*, *Fribly v. S.*, 42 O. St. 205.

¹ *Reg. v. Burgess*, 15 Cox C. C. 779; *S. v. Duhammel*, 2 Harr. (Del.) 532.

² *S. v. Ash*, 33 Or. 86, 54 P. 184; *contra*, *Rex v. Stone*, 4 C. & P. 379.

³ *Beeley v. Wingfield*, 11 East, 46; *Powell v. Flanary*, 22 Ky. Law. Rep. 908, 59 S. W. 5; *Catlin v. Henton*, 9 Wis. 476.

⁴ *S. v. Ruthven*, 58 Ia. 121, 12 N. W. 235; *C. v. Pease*, 16 Mass. 91.

⁵ *Edgecombe v. Rodd*, 5 East, 294.

⁶ *Keir v. Leeman*, 6 Q. B. N. S. 308.

⁷ *S. v. Carver*, 69 N. H. 216, 39 Atl. 973.

⁸ *Johnson v. Ogilby*, 3 P. Williams, 278; *Geier v. Shade*, 109 Pa. 180; *Rothermal v. Hughes*, 134 Pa. 510, 19 Atl. 677.

⁹ *Keir v. Leeman*, *supra*.

¹⁰ *Rohrheimer v. Winters*, 126 Pa. 253, 17 Atl. 606, M. 103.

¹¹ See *P. v. Dalrymple*, 55 Mich. 519, 22 N. W. 20, M. 102.

nevertheless caused by his criminal act;¹ thus where the deceased, who was deaf, negligently walked in the middle of the road on a dark night, and the defendant acting in a criminally negligent manner ran him down;² so where the defendant overloaded his boat in a criminally negligent way and being so overloaded it was upset by the carelessness of a passenger who was drowned.³ So the fact that the person killed was so weakened by his own dissipation that he died from a blow that would not have killed a reasonably well man is no defence.⁴ On the same principle it has been held to be no defence that a second wound also contributed to bring about the death. That fact would merely render the person inflicting it also liable;⁵ and it would be the same even though the second wound was inflicted by the deceased himself.⁶ So where the negligence of several combine to bring about the fatal result.⁷ On the other hand, the mere fact that the defendant's blow might have caused the death of the deceased cannot render him criminally liable for it if in fact death came from independent causes, as where A inflicts on X a wound of mortal nature and B, either contemporaneously⁸ or later,⁹ kills him outright; the actual death is due solely to B. So where the negligence of the injured party might fairly be regarded as the sole active cause of the injury, the defendant is to be acquitted, because he has not in fact done the act charged;¹⁰ but such negligence is not properly described as contributory.

¹ *Reg. v. Kew*, 12 Cox C. C. 355, C. 150, K. 135 (but see *Reg. v. Birchall*, 4 F. & F. 1087, C. 149); *Belk v. P.*, 125 Ill. 584, 17 N. E. 744; *Crum v. S.*, 64 Miss. 1, 1 So. 1.

² *Reg. v. Swindall*, 2 C. & K. 230; *Reg. v. Longbottom*, 3 Cox C. C. 439, M. 94; *Belk v. P.*, *ante*; *contra*, *Reg. v. Birchall*, *ante*.

³ *Reg. v. Williamson*, 1 Cox C. C. 97, M. 91.

⁴ *P. v. Moan*, 65 Cal. 532, 4 P. 545; *S. v. Castello*, 62 Ia. 404, 17 N. W. 605. Compare *Rex v. Johnson*, 1 Lewin C. C. 164.

⁵ *S. v. Tidwell*, 70 Ala. 33; *P. v. Ah Fat*, 48 Cal. 61.

⁶ *P. v. Lewis*, 124 Cal. 551, 57 P. 470, M. 569.

⁷ *Reg. v. Haines*, 2 C. & K. 368.

⁸ *Walker v. S.*, 116 Ga. 537, 42 S. E. 787.

⁹ *S. v. Scates*, 5 Jones (N. C.), 420.

¹⁰ *Rex v. Waters*, 6 C. & P. 328, M. 90; *Reg. v. Dalloway*, 2 Cox C. C. 273; *Belk v. P.*, 125 Ill. 584, 17 N. E. 744; *Crum v. S.*, 64 Miss. 1, 1 So. 1.

For the same reason, negligence by the injured party in caring for a wound will not make the offender the less chargeable with the ultimate effect of the wound,¹ nor will refusal by the injured party to submit to an operation that would have saved his life,² and improper treatment of the wound by the surgeon is equally unavailing to purge the offender's guilt.³

§ 25. **Effect of Guilty Participation by the Injured Party.** — The fact that the injured party was injured while himself engaged in an illegal act against the defendant does not lessen the criminality of the offence; for the public wrong is equally great, though the individual may have suffered no more than he deserved. Thus, where the injured party was cheated while himself endeavoring to cheat the defendant, the latter is guilty.⁴ Where a servant absconds with money given him for the master for an illegal purpose, he is nevertheless guilty of embezzlement.⁵ And where the defendant gave a girl a counterfeit coin, knowing it to be counterfeit, as a consideration for illicit intercourse, he was held guilty of uttering the coin.⁶ So where the injured party is cheated while endeavoring to buy counterfeit money,⁷ or to obtain government land to which he has no right,⁸ or to defraud a third person out of claims against him.⁹ But if the indictment is attempted to be based

¹ *Rex v. Rew*, Kel. 26, M. 559; *McAllister v. S.*, 17 Ala. 434; *Kee v. S.*, 28 Ark. 155; *S. v. Bantley*, 44 Conn. 537.

² *Reg. v. Holland*, 2 Moo. & Rob. 351; *Franklin v. S.*, 41 Tex. Cr. R. 21, 51 S. W. 951.

³ *Reg. v. Davis*, 15 Cox C. C. 174; *Thomas v. S.*, 139 Ala. 80, 36 So. 734; *C. v. Hackett*, 2 All. (Mass.) 136, C. 168; *S. v. Landgraf*, 95 Mo. 97, 8 S. W. 237; *C. v. Eisenhower*, 181 Pa. 470, 37 Atl. 521. See also *post*, § 230.

⁴ *Reg. v. Hudson*, 8 Cox C. C. 305, C. 142; *C. v. Morrill*, 8 Cush. (Mass.) 571, C. 146. See, however, *contra*, *McCord v. P.*, 46 N. Y. 470, C. 148; *S. v. Crowley*, 41 Wis. 271.

⁵ *Rex v. Beacall*, 1 C. & P. 454.

⁶ *Queen v. —*, 1 Cox C. C. 250, C. 145.

⁷ *Crum v. S.*, 148 Ind. 401, 47 N. E. 833.

⁸ *Re Cummins*, 16 Col. 451, 27 P. 887.

⁹ *P. v. Martin*, 102 Cal. 558, 36 P. 952, M. 98. See also *Rex v. Mott*, 2 C. & P. 521; *Gilmore v. P.*, 87 Ill. App. 128; *C. v. O'Brien*, 172 Mass. 248, 52 N. E. 77; *Cunningham v. S.*, 61 N. J. L. 67, 38 Atl. 847.

on what the law does not recognize, as, for instance, depriving one of an office that never existed, it is, for this reason, defective.¹

THE CRIMINAL INTENT.

§ 26. **Motive Immaterial.** — Like immorality of act, immorality of purpose is not an element of crime. The motive with which an act was done is immaterial in deciding the question of its criminality: a crime may be committed with a good motive, while an act done from a sinful motive is not necessarily criminal. Motive may, it is true, sometimes be shown in evidence; but it is merely as evidence of intent.

Motive must not be confounded with intent. The intent applies to and qualifies the act. Motive is that which leads to the act. And while it is essential in common law crimes that the intent to commit the crime should appear, either expressly or by implication, no such necessity exists as to motive, and it need not be proved.²

If, therefore, the intent to violate the law exists, the motive, as has been said, is immaterial. For example, it is an indictable offence at common law to enter, without the consent of the owner, an unconsecrated burial-ground, and dig up and carry away a corpse buried there, though it be done openly, decently, and properly by a relative, and from a sense of filial duty and religious obligation.³ Nor will it be any justification for a person who intentionally does an act which the law prohibits, — voting, for instance, — that he conscientiously believed he had a right to vote, notwithstanding the statute;⁴ so fishing where the law forbids,⁵ or issuing passes,⁶ or selling

¹ *Rex v. Stratton*, 1 Camp. 549.

² *Baalam v. S.*, 17 Ala. 451; *C. v. Hudson*, 97 Mass. 565; *P. v. Robinson*, 1 Park (N. Y.), C. R. 649; *S. v. Coleman*, 20 S. C. 441, M. 139.

³ *Reg. v. Sharpe*, 7 Cox C. C. 214; *S. v. McLean*, 121 N. C. 589, 28 S. E. 140; *Phillips v. S.*, 29 Tex. 226.

⁴ *U. S. v. Anthony*, 11 Blatch. C. Ct. 200, Fed. Cas. No. 14,459, 2 Green's Cr. Law Rep. 208, and note.

⁵ *S. v. Huff*, 89 Me. 521, 36 Atl. 1000.

⁶ *S. v. So. Ry. Co.*, 122 N. C. 1052, 30 S. E. 133.

liquor¹ or lottery tickets,² or carrying weapons.³ Nor is it a defence that the act would be harmless;⁴ nor that it would be for the public benefit.⁵ Nor can polygamy⁶ or obscenity⁷ be excused on the ground that the offender acted from the highest motives of religion or morality. And one is guilty of crime who refuses to obey a statutory duty to call in medical aid for a child, though he thought it irreligious to call in such aid.⁸ Nor is it of avail that the real purpose is other than to violate the law, the natural result of the act being to violate the law; as where one assaults an officer in the discharge of his duty, the purpose not being to hinder the officer in the discharge of his duty, but to inflict upon him personal chastisement, on account of some private grief. If the act results in the obstruction of the officer in the discharge of his duty, the offender is guilty of the latter offence.⁹ So where logs are left in a stream, thereby impeding navigation, although the only purpose was to store them there for business reasons.¹⁰

§ 27. **General Criminal Intent Presumed from the Unlawful Act.**

— Aside from cases of negligence¹¹ it is ordinarily necessary, in order to render a man criminally responsible, that there should be a voluntary act by him that the law of crimes forbids. This is often expressed in the proposition that when a man does an act that the law thus forbids, the law will presume the existence of a criminal intent and so punish him.

¹ *Marmont v. S.*, 48 Ind. 21; *Pisar v. S.*, 56 Neb. 455, 76 N. W. 869; *S. v. Presnell*, 12 Ire. (N. C.) 103; *S. v. Voight*, 90 N. C. 741.

² *C. v. Bull*, 76 Ky. 656.

³ *Hardy v. S.*, Tex. 44 S. W. 173. See also *Hood v. S.*, 56 Ind. 263; *S. v. Zichfield*, 23 Nev. 304, 46 P. 802.

⁴ *U. S. v. Bott*, 11 Blatch. C. Ct. 346, Fed. Cas. No. 14,626, 2 Green's Cr. Law Rep. 239; *P. v. O'Brien*, 96 Cal. 171, 31 P. 45.

⁵ *Resp. v. Caldwell*, 1 Dall. (Pa.) 150; *C. v. Belding*, 13 Met. (Mass.) 10.

⁶ *Reynolds v. U. S.*, 98 U. S. 145, C. 95, K. 31.

⁷ *Reg. v. Hicklin*, L. R. 3 Q. B. 360; *U. S. v. Harmon*, 45 Fed. 414.

⁸ *Reg. v. Downes*, 13 Cox C. C. 111; *Reg. v. Senior*, 19 Cox C. C. 219, M. 143.

⁹ *U. S. v. Keen*, 5 Mason C. Ct. 453, Fed. Cas. No. 15,511.

¹⁰ *S. v. Corporation*, 111 N. C. 661, 16 S. E. 331.

¹¹ See *post*, §§ 29 et seq.

In the light of the preceding section, and bearing in mind the distinction between *motive* and *intent* it is clear that this proposition is only a succinct statement of the truth that if a man voluntarily does an act he necessarily has the *intent* to do it. When one does an unlawful act, he is by the law also presumed to have intended the ordinary and natural consequences flowing from that act, on the ground that these must have been within his contemplation, if he is a sane man, and acts with the deliberation which ought to govern men in the conduct of their affairs.¹ He is none the less responsible for the natural consequences of his criminal act because, from ignorance, or carelessness, or neglect, precautionary measures are not taken to prevent those consequences.² In some cases of statutory crimes, as we shall see, this presumption is conclusive as to the intended consequences, and cannot be met by counter proof. As a general rule, however, in those cases where an act in itself not criminal becomes so only if done with a particular intent, there the intent must be proved by the prosecution; while in those cases where the act is in itself criminal the law implies a criminal intent, and leaves it open to the defendant to excuse or justify.³ But the unlawfulness of the act is a sufficient ground upon which to raise the presumption of criminal intent.⁴ It is, of course, always open to proof that there was no intention to do any act at all, whether lawful or unlawful; as that the person charged was insane, or was compelled to the act against his will, or was too young to be capable of entertaining a criminal intent. So, at least when the act is criminal in its nature and not peremptorily prohibited

¹ *Rex v. Dixon*, 3 M. & S. 11, M. 137; *Mullens v. S.*, 82 Ala. 42, 2 So. 481; *C. v. Webster*, 5 Cush. (Mass.) 305; *C. v. Randall*, 4 Gray (Mass.), 36; *P. v. Kirby*, 2 Park Cr. R. (N. Y.) 28, M. 142; *S. v. King*, 86 N. C. 603; *U. S. v. Taintor*, 11 Blatch. C. Ct. 374, Fed. Cas. No. 16,428, 2 Green's Cr. Law Rep. 241, and note.

² *Reg. v. Holland*, 2 M. & Rob. 351, K. 93; *Rex v. Reading*, 1 Keb. 17; *S. v. Bantley*, 44 Conn. 537; *C. v. Hackett*, 2 Allen (Mass.), 136, C. 168.

³ *Rex v. Woodfall*, 5 Burr. 2667; *S. v. Goodenow*, 65 Me. 30; 3 Greenl. Ev., § 13.

⁴ *C. v. Randall*, 4 Gray (Mass.), 36; *U. S. v. Taintor*, *ante*, and cases cited, *ante*.

by the statute, it may be shown that it was done through mistake; as where one drives off the sheep of another, which are in his own flock without his knowledge,¹ or, intending to shoot a burglar, by mistake shoots one of his own family.²

§ 28. **Constructive Intent.** — The criminal intent need not be an intent to commit the exact offence actually complained of. A defendant may have intended to do one criminal act, and may in fact have done another; for instance, intending to inflict severe bodily harm, he may have killed the person he intended only to injure. In such a case both the elements of a crime are present; the act which is criminal has been done with a wicked and criminal intent; the public has been wronged, and the offender is a fit subject for punishment. Yet it would be too severe a rule to punish him in every case of the sort, however unexpected the result of his act.

If the offender intended a mere civil wrong, an act which was not criminal, and without any negligence on his part a result happened which is in the nature of a criminal act, it is clearly not a crime, but an accident.³ And so if the intention was merely to do a *malum prohibitum*, — to break a police regulation, such as an ordinance against fast driving, — and an unexpected result happened entirely without negligence, the offender should not be held a criminal because of the result, the reason being that there is no criminal intent to carry over to the injury actually resulting. For this reason it has been said that the distinction is not so much between *mala in se* and *mala prohibita*, as between offences which require a criminal intent and those which do not. If in the course of committing an act of the first kind, even though it be a *malum prohibitum*, an unexpected criminal result follows, it would seem that the defendant would be liable therefor. Thus where a statute punished the keeping of liquor without a license, and also punished the keeping of adulterated liquor, the defendant intending to keep liquor against the statute was held punishable for the fact that it was, unknown to him,

¹ 1 Hale P. C. 507.

² Ibid., 42.

³ Reg. v. Franklin, 15 Cox C. C. 163, C. 105, K. 118, M. 158.

adulterated, the intent required by the statute being carried over from the act intended to what was actually done.¹

The offence he intended to do must at least be one which in itself was sinful.² Whether a sinful or immoral intent alone would be sufficient does not seem clear. Strictly speaking, there is no criminal intent to carry over to the unexpected result, and it would seem, therefore, that the mental element necessary to make the crime could not be found. Yet there are cases holding that where the defendant attempts to do an act of a sort that the law forbids but not strictly within its terms, if in fact the result is an act within the terms of the statute, he will be held responsible therefor, although his intent was not technically criminal. Thus where the statute forbids the taking of a girl under sixteen from the custody of her guardian without his consent, and A does so, believing the girl to be over sixteen, if she was in fact under, he is punishable.³

If the offender intended a crime of violence, and in the course of it committed another crime of the same sort, naturally growing out of it, he is responsible for the crime he committed. Thus, where one attempted suicide, and accidentally killed a man who attempted to prevent the suicidal act, he is guilty of homicide.⁴ So where A makes an assault on B, and in the course thereof accidentally injures C, he may be indicted for an assault on the latter,⁵ or if the result is to strike out an eye, for a mayhem.⁶ So where A sets fire to a dwelling house, and persons are thereby accidentally burned to death, he is guilty of homicide.⁷ So where one intended to

¹ *S. v. Stanton*, 37 Conn. 421, M. 161.

² *Reg. v. Bruce*, 2 Cox C. C. 262, K. 136; *C. v. Adams*, 114 Mass. 323, M. 160; *Estell v. S.*, 51 N. J. L. 182, 17 Atl. 118.

³ *Reg. v. Prince*, L. R. 2 C. C. 154, K. 21, M. 173; *P. v. Fowler*, 88 Cal. 136, 25 P. 1110; *S. v. Ruhl*, 8 Ia. 447; *Riley v. S.*, Miss. , 18 So. 117. So as to rape on a girl under the age of consent: *P. v. Ratz*, 115 Cal. 132, 46 P. 915. Compare *Rex. v. Pedley*, Cald. 218; and see *post*, § 56.

⁴ *C. v. Mink*, 123 Mass. 422, C. 104, K. 110.

⁵ *Rex. v. Hunt*, 1 Moo. 93, M. 152.

⁶ *Anon.*, Y. B. 13 H. VII, 14, pl. 5, K. 20.

⁷ *Reg. v. Serné*, 16 Cox C. C. 311, C. 183, M. 600; *Reddick v. C.*, 17 Ky. L. R. 1020, 33 S. W. 416.

commit robbery, but in the course of it killed the victim, he is guilty of homicide.¹ And where the result, though not intended, follows naturally from the criminal act that was intended, it is immaterial that the crime intended was of a less heinous degree than the result actually produced; in other words the criminal intent need not be of the same degree as the ultimate criminal result. Thus, where the defendant attempted to commit an assault on a slave and in the course thereof killed a free man, he was held for the death of the latter;² so where he intended to kill a negro and in fact killed a white, the two offences being differently punished.³ It has even been held that one committing an act of violence is criminally responsible for all consequences, however unexpected. So where one assaulted a woman with intent to commit rape, and she, to ransom her honor, without demand gave him money, this was held to be robbery.⁴ So where the defendant struck at B and the blow frightened a child into convulsions from which it died, the jury were instructed that if the death was caused by the defendant's act he was guilty of manslaughter.⁵ And there is no doubt that if one intended homicide he is guilty of murder, though he intended to kill A and actually killed B.⁶

It would seem that, even if the result was unexpected, the defendant is guilty, if his intention was to commit a felony or other serious crime.

But the result, whether unexpected or otherwise, must be caused by the defendant's criminal act; if the latter is so far back in the chain of causation as not to be at least a partial effective cause, the defendant is not responsible. Thus where A in violation of the statute kept fireworks, and while they were so kept they were negligently exploded by his servants,

¹ *S. v. Barrett*, 40 Minn. 77, 41 N. W. 463; *S. v. Pike*, 49 N. H. 399.

² *Bob v. S.*, 29 Ala. 20.

³ *Isham v. S.*, 38 Ala. 213, M. 148. See also *Reg. v. Forbes*, 10 Cox C. C. 362.

⁴ *Rex v. Blackham*, 2 East P. C. 711.

⁵ *Reg. v. Towers*, 12 Cox C. C. 530, C. 163, K. 95.

⁶ *Saunder's Case*, 2 Plowd. 473, C. 176, K. 81; *Gore's Case*, 9 Co. 81 a, C. 182, M. 557; *Wynn v. S.*, 63 Miss. 260.

thereby killing a third person, A was held not responsible for the death.¹

§ 29. **Accident. Negligence.** — Where an act happens through mere accident, there is necessarily an absence of criminal intent; and a mere accident, therefore, can never be a crime. But if the accident was caused by a breach of duty on the part of the accused, that breach of duty may have been so culpable as properly to be called criminal. Such a thing is not a mere nonfeasance; failure to do one's duty may often be regarded as a deliberate act, and if not deliberate it may at least be treated as voluntary, so as to be charged as committed with a criminal intent. A breach of duty so culpable as to be either deliberate or voluntary is called criminal negligence; and is a sufficient criminal intent to make an act a crime.

§ 30. **Negligence when Criminal.** — It has been said that, in order to give rise to a criminal prosecution, the duty infringed must have been a public duty; by which is meant a duty imposed by law. Thus, it is said, the duty of a parent to support his child, or of a watchman at a railway crossing, who was required to be so placed by statute, would be of such a nature that the infringement of it would be criminal; but not so the negligence of a watchman at a railway crossing who was placed there, not in consequence of a statute, but by private liberality.² This position, however, appears not to be sound.

It is clear that if A owes a duty directly to B and by a criminally negligent failure to comply with that duty he injures B, he should be punishable therefor. This covers all cases of so-called negligent acts of commission: thus A, simply as a member of the community owes B, any other member, the duty of not shooting him, or dropping timbers upon him, or driving over him, and if A negligently fail in that duty, i. e., negligently shoots B, or drops timbers on him, or drives over him, and that negligence is sufficiently gross for the criminal law to take cognizance thereof, he is clearly

¹ Reg. v. Bennett, Bell. 1, M. 567, K. 93; Potter v. S., 162 Ind. 213, 70 N. E. 129; see also P. v. Rockwell, 39 Mich. 503.

² Reg. v. Smith, 11 Cox C. C. 210, C. 116.

punishable for the result of his negligent act.¹ The same principle will hold good where A owes B the duty, not of refraining, but of doing;—a duty which may arise either by contract or by operation of law. Thus the husband owes the wife the duty of providing shelter for her,² the parent owes the infant child a similar duty,³ so the master and the apprentice.⁴ Under these or similar conditions,⁵ where the duty of acting exists, criminal negligence, resulting in an injury that the law punishes, will make the defendant responsible for that injury.

It would seem, however, that responsibility for acts of criminal negligence cannot be limited to the above cases. Any duty which one undertakes ought so to be performed as not to injure the public; and culpable negligence in the performance of any duty, if its result is in nature criminal, ought to be punished. Thus, where a workman in a mine is charged with the duty of putting a stage over the mouth of the shaft, and the omission so to do causes the death of a human being, he is guilty of homicide.⁶ So where a person charged with the duty of hoisting persons from a mine leaves the engine in charge of a boy known to be incompetent,⁷ or a railroad employee neglects to flag a train,⁸ or put on brakes⁹ or turn a switch,¹⁰ and such negligence is so gross as to be

¹ *Reg. v. Salmon*, 14 Cox C. C. 494; *Hull's Case*, Kel. 40, M. 215; *Rigmaidon's Case*, 1 Lewin C. C. 180, K. 122, M. 217; *Knight's Case*, 1 Lewin C. C. 168, K. 130, M. 217; *Reg. v. Kew*, 12 Cox C. C. 355, K. 135; *Reg. v. Dant*, 10 Cox C. C. 102, K. 126; *Rex v. Sullivan*, 7 C. & P. 641, K. 116; *Fenton's Case*, 1 Lewin C. C. 179, K. 117, M. 563; *P. v. Pearne*, 118 Cal. 154, 50 P. 376; *C. v. McLaughlin*, 5 All. (Mass.) 507; *S. v. Barnard*, 88 N. C. 661; *Lee v. S.*, 1 Cold. (Tenn.) 62.

² *Terr. v. Manton*, 7 Mont. 162, 14 P. 637.

³ *Reg. v. Conde*, 10 Cox C. C. 547; *Reg. v. Handley*, 13 Cox C. C. 79; *S. v. Behm*, 72 Ia. 533, 34 N. W. 319; *Gibson v. C.*, 106 Ky. 360, 50 S. W. 532.

⁴ *Rex v. Self*, 1 East P. C. 226; *Reg. v. Smith*, 8 C. & P. 153.

⁵ *Rex v. Huggins*, 2 Str. 882, M. 559; *Reg. v. Edwards*, 8 C. & P. 611.

⁶ *Reg. v. Hughes*, 7 Cox C. C. 301, C. 114.

⁷ *Reg. v. Lowe*, 3 C. & K. 123.

⁸ *Rex v. Pargeter*, 3 Cox C. C. 191.

⁹ *Reg. v. Elliott*, 16 Cox C. C. 710.

¹⁰ *S. v. O'Brien*, 32 N. J. L. 169, M. 218.

criminal, he is responsible for the injuries resulting therefrom. Although his primary duty is the contractual one toward his employer, by the very fact of undertaking that he owes a duty toward all those whom his contract requires him to serve or act for.¹

Where A, the defendant, originally owed no duty to B, either directly or by contract with a third person, it would seem that nevertheless, if A so acts toward B that the latter is induced to rely on the defendant and so put himself in such a position that a failure by the defendant to continue the action thus begun will result in injuries that if intentionally inflicted would render the defendant criminally responsible, the defendant is punishable if, as a result of his negligence, those injuries do in fact occur. It is enough if the person injured had reason in fact to rely on the defendant's care, whether he had a legal right so to rely or not. So where one chooses to take care of a child of tender years, though bound neither by law nor by contract so to do, he is guilty of crime if his culpable negligence cause injury to the child.² So where the defendant voluntarily undertakes the care of an aged and helpless woman and then neglects to provide for her.³

The responsibility in all these cases is predicated upon a failure by the defendant to perform a legal duty to the party injured; consequently, where there is no duty, a failure to act on the part of the defendant, even though by acting the injury to the third party could have been avoided, can create no legal liability. Thus, where a mother refuses to get a midwife for her daughter, the daughter being of age and with no contractual claim against her mother, and the latter not having undertaken to see the daughter through her trouble,

¹ For other cases of criminal responsibility when the duty is primarily a contractual one with third persons see *Reg. v. Haines*, 2 C. & K. 368; *Reg. v. Benge*, 4 F. & F. 504; *Rex v. Pitwood*, 19 T. L. R. 37; *contra*, *Reg. v. Barrett*, 2 C. & K. 343.

² *Reg. v. Bubb*, 4 Cox C. C. 455; *Reg. v. Martin*, 11 Cox C. C. 136 (*semble*); *Reg. v. Nicholls*, 13 Cox C. C. 75; *Lewis v. S.*, 72 Ga. 164.

³ *Reg. v. Marriott*, 8 C. & P. 425, M. 229; *Reg. v. Instan* [1893], 1 Q. B. 450; *contra*, *Rex v. Smith*, 2 C. & P. 449.

she is not criminally responsible for the death of the daughter although due to such failure.¹

On the other hand, the fact that the defendant owed a duty to the injured person which he neglected to perform will not render him punishable unless that neglect was the cause of the injury. Thus where a master, with criminal negligence, fails to supply proper food for his servant, if the latter can get it by other means, and refuses to do so, it is not the negligence of the master but his own stubbornness that causes his death;² and so where the captain of a vessel negligently fails to pick up a sailor who has fallen overboard, if it appears that the sailor must have sunk before any boat could reach him, his death cannot be said to be due to the captain's negligence.³

§ 31. **What Negligence Is Culpable.** — Not every degree of negligence is sufficient for conviction of crime. It must be culpable negligence; such as may fairly be described as gross, wanton, or wicked.⁴ A mere error of judgment in a matter on which reasonable men may differ, as in the proper sort of medical attendance to call in for a sick person,⁵ or the proper remedies to apply,⁶ is not sufficient. But carelessness in handling a weapon that is dangerous to life is criminal.⁷

Whether, in determining the defendant's negligence he should be judged by the standard of the average reasonable man, or by his own standard of care is a point upon which the decisions do not agree. On principle it would seem clear

¹ *Reg. v. Shepherd*, 1 L. & C. 147, M. 223. There being no common law of crimes in Ohio, an act, though grossly negligent, cannot be criminally so, unless forbidden by the criminal law of the State: *Johnson v. S.*, 66 O. St. 59, 63 N. E. 607, 61 L. R. A. 277, with elaborate note on homicide through negligence.

² *Reg. v. Smith*, 10 Cox C. C. 82.

³ *U. S. v. Knowles*, 4 Sawy. 517, Fed. Cas. No. 15,540; *Re Doig*, 4 Fed. 193; and see *ante*, § 24.

⁴ *Reg. v. Noakes*, 4 F. & F. 920; *Reg. v. Finney*, 12 Cox. C. C. 625, K. 120; *Reg. v. Nicholls*, 13 Cox C. C. 75; *Reg. v. Wagstaffe*, 10 Cox C. C. 530, C. 100; *S. v. Hardister*, 38 Ark. 605.

⁵ *Reg. v. Wagstaffe*, *ante*.

⁶ *S. v. Hardister*, *ante*.

⁷ *S. v. Hardie*, 47 Ia. 617, K. 123; *Chrystal v. C.*, 72 Ky. 669.

that, since a criminal frame of mind is essential to punishability, and there is no criminal intent, the defendant cannot be said to be in a punishable frame of mind unless he personally must have known that his actions were grossly negligent.¹ If the action of the defendant is prescribed by law, then his belief as to the necessity or reasonableness of the requirement can have no bearing on his criminal liability, but he is held up to the external standard thus established.²

§ 32. *Specific Intent*. — When a specific intent is made an ingredient in crime, — as where one is charged with an assault with intent to murder, or to commit rape, or with a burglarious entering with intent to steal, — the offence is not committed unless the accused is actuated by the specific intent charged. The intent to commit another crime, though of equal grade and of the same character with the one charged, will not constitute the offence charged.³ Thus an indictment for wounding with intent to maim and disable is not sustained by showing that the wounding was with intent to escape apprehension,⁴ nor an indictment for conspiracy with intent to defraud X by showing an intent to defraud Y.⁵

Instances of specific intent are malice, premeditation, intent to steal, to defraud, etc. In all cases where an act is not

¹ *Reg. v. Wagstaffe*, 10 Cox C. C. 530, C. 100; *Reg. v. Elliott*, 16 Cox C. C. 710; *S. v. Obershaw*, 11 Mo. App. 85. As to physicians, that it is enough if they act in good faith and by their own best lights: *Reg. v. Markuss*, 4 F. & F. 356, K. 124; *S. v. Schulz*, 55 Ia. 628, 8 N. W. 469; *Caywood v. C.*, 7 Ky. L. R. 224; *C. v. Thompson*, 6 Mass. 134; *Rice v. S.*, 8 Mo. 561; *Robbins v. S.*, 8 O. St. 131; *contra*, that a person acting as physician must exercise the skill and foresight of an average reasonable man in his position: *Reg. v. McDonald*, 12 Cox C. C. 534, M. 220; *C. v. Pierce*, 138 Mass. 165; *S. v. Power*, 24 Wash. 34, 63 B. 1112.

² *Reg. v. Downes*, 13 Cox C. C. 111, C. 102; *Reg. v. Senior*, 19 Cox C. C. 219, M. 143; *P. v. Pierson*, 80 App. Div. (N. Y.) 415, 81 N. Y. S. 214; *U. S. v. Beacham*, 29 Fed. 284. Compare *S. v. Chenoweth*, Ind. , 71 N. E. 197.

³ *Rex v. Boyce*, 1 Moo. C. C. 29; note to *U. S. v. Taintor*, 2 Green's Cr. L. Rep. 244.

⁴ *Rex v. Boyce*, *ante*; *Rex v. Duffin*, R. & R. 365, M. 167; *Rex v. Kelly*, 1 Crawf. & D. 186; *Rex v. Pearce*, 1 Leach, 4th ed. 594.

⁵ *C. v. Harley*, 7 Met. (Mass.) 506.

criminal, or is criminal in a less degree, unless committed in a certain state or condition of mind, express proof of this specific condition of mind is necessary, and proof of general criminal intent is not enough.¹

Such specific intent cannot be presumed. It must be proved by the government as one of the necessary facts of the case, though the defendant's acts may be shown as evidence from which the jury can find that he was actuated by the intent charged. Thus in an indictment for larceny the fact that the defendant took the goods knowing them to belong to another is grounds for the jury to find that in fact he took them *animo furandi*;² so in an indictment for cutting with intent to maim, the fact that the defendant intentionally used a weapon likely to maim may justify the jury in finding that such was his intent when he struck the blow.³

Since the existence of the specific intent is thus a question of fact in each case, while the jury may often be justified in concluding that, from the action of the defendant under the circumstances, he must as a sane man have had the specific intent with which he was charged, it is always open to the defendant to lay other evidence before the jury to show that, the natural inference to the contrary notwithstanding, he did not have the specific intent charged. Thus where the defendant was charged with entering a stable with intent to kill a horse, he was allowed to show that although he did intentionally enter and cut the leg of the horse so that the animal died, his intent was only to disable it;⁴ so in an indictment for

¹ *Rex v. Scofield*, Cald. 397; *C. v. Walden*, 3 Cush. (Mass.) 558, C. 118.

² *S. v. Patton*, 1 Marv. (Del.) 552, 41 Atl. 193.

³ *S. v. Jones*, 70 Ia. 505, 30 N. W. 750. See also as to the finding of the existence of the specific intent in forgery: *Curtis v. S.*, 118 Ala. 125, 24 So. 111; false pretences: *P. v. Baker*, 96 N. Y. 340; burglary: *Harvick v. S.*, 49 Ark. 514, 6 S. W. 19; conspiracy: *P. v. Flack*, 125 N. Y. 324, 26 N. E. 267; assault with intent: *Ogletree v. S.*, 28 Ala. 693; *Kimball v. S.*, 112 Ga. 541, 37 S. E. 886; *Roberts v. P.*, 19 Mich. 401; defrauding the government: *U. S. v. Buzzo*, 18 Wall. 125; *U. S. v. Houghton*, 14 Fed. 514.

⁴ *Dobb's Case*, 2 East P. C. 513.

cutting down a boundary tree with intent to destroy the mark, in spite of the natural presumption that the defendant in so doing must have done it with the intent of obliterating the boundary; he may show that in fact his intent was otherwise.¹

Here, however, as with general criminal intent, the distinction between intent and motive must be borne in mind. Thus where the defendant was indicted for forging a receipt with intent to defraud A, and it appeared that he made the forgery in order to get the money thereby from A, it was immaterial that he did not wish to injure A and did it only because he needed the money.²

§ 33. **Malice.** — Although in a popular sense malice means hatred, hostility, or ill will, yet in a legal sense it has a much broader signification. In the latter sense it is the *conscious violation of the law to the prejudice of another*. It is evil intent or disposition, whether directed against one individual or operating generally against all, from which proceeds any unlawful and injurious act, committed without legal justification. Actions proceeding from a bad heart actuated by an unlawful purpose, or done in a spirit of mischief, regardless of social duty and the rights of others, are deemed by the law to be malicious.³ The voluntary doing of an unlawful act is a sufficient ground upon which to raise the presumption of malice. And so if the act be attended by such circumstances as are

¹ *S. v. Malloy*, 34 N. J. L. 410. See also *Reg. v. Gurnsey*, 1 F. & F. 394; *S. v. Jefferson*, 3 Harr. (Del.) 571; *P. v. Cotteral*, 18 Johns. (N. Y.) 115; *P. v. Orcutt*, 1 Parker Cr. R. (N. Y.) 252; *S. v. Mitchell*, 27 N. C. 350.

² *Rex v. Sheppard*, R. & R. 169; *Reg. v. Cooke*, 8 C. & P. 582; *Reg. v. Todd*, 1 Cox C. C. 57. See also *Reg. v. Regan*, 4 Cox C. C. 335, M. 141; *Rex v. Gillow*, 1 Moo. 85, M. 213; *U. S. v. William Arthur*, 3 Ware, 276, Fed. Cas. No. 16,702; *post*, § 254. Compare *Rex v. Williams*, 1 Leach, 4th ed. 529, M. 211.

³ *Foster Cr. Law*, 256; *Ferguson v. Kinnoull*, 9 C. & F. 251 at 302, 321; *Crowell v. P.*, 190 Ill. 508, 60 N. E. 872; *S. v. Decklotts*, 19 Ia. 447; *C. v. Webster*, 5 Cush. (Mass.) 295 at 305; *C. v. Chance*, 174 Mass. 245, 54 N. E. 551; *Bevans v. U. S.*, Fed. Cas. No. 14,589; *Bias v. U. S.*, 3 Ind. Terr. 27, 53 S. W. 471. See *C. v. Walden*, 3 Cush. (Mass.) 558, C. 118.

the ordinary symptoms of a wicked and depraved spirit, the law will, from these circumstances, imply malice, without reference to what was passing in the mind of the accused at the time when he committed the act.¹

Envy and hatred both include malice; but the latter may exist without either, and is a more general form of wickedness. As to the proof of malice and the degree thereof necessary to constitute specific crimes, more will be said hereafter, as occasion requires.² Something will also be said under Homicide of the not now very material distinction between express and implied malice.

§ 34. **Constructive Specific Intent.**—The doctrine of constructive intent is clearly inapplicable in a case where a specific intent must be proved; for an express intent is necessary. Thus, where a statute punished malicious injury to property, and the defendant threw a stone intending to injure a human being, and in fact injured property, it was held that the specific malice required by the statute was not present;³ and where a statute punished the malicious destruction of a vessel, and the defendant while stealing rum in a vessel accidentally set fire to it and destroyed it, he was held not guilty under the statute.⁴ But the specific intent may be present, though the result is not precisely what was intended. Thus one may be convicted under a statute for maliciously injuring a person, though he maliciously struck at A, and in fact hit B, or for killing with malice aforethought when he left poison for A which B took.⁵ So where he shoots at A and hits B he may be indicted for an assault with intent to kill. So where A attempts to kill himself and kills B he is guilty of murder.⁶ The specific intent called for, viz., the malice in the one case

¹ *S. v. Smith*, 2 Strobb. (S. C.) 77.

² See *Arson*, *Homicide*, and *Malicious Mischief*.

³ *Reg. v. Pembrton*, 12 Cox C. C. 607, C. 120, K. 157, M. 171; *Niblo v. S.* (Tex.), 79 S. W. 31.

⁴ *Reg. v. Faulkner*, 13 Cox C. C. 550, C. 106, K. 152.

⁵ *Saunders's Case*, 2 Plowd. 473, C. 176, K. 81; *Gore's Case*, 91 Co. 81 a, C. 182, M. 557; *post*, §§ 221 et seq.

⁶ *S. v. Lindsey*, 19 Nev. 47, 5 P. 822; *S. v. Levelle*, 34 S. C. 120, 13 S. E. 319, M. 604. Compare *C. v. Mink*, 123 Mass. 422, C. 104, K. 110.

and the intent to kill in the other case, here existed.¹ So where A attempts to commit what he, because of a *bona fide* mistake of fact as to the age of the girl, believes to be fornication, but which, because of her age, is rape, he may be indicted for an attempt to commit rape, the specific intent being of so similar a nature as to supply that element in the crime.² On the other hand where the defendant strikes or shoots at A and hits B, an indictment for assault on B with intent to wound or kill B is not good, because the intent as now alleged in the more specific form cannot be established.³ And so an indictment for assaulting X with intent to kill him is not sustained by showing that the defendant wantonly shot into a crowd;⁴ a fact that would have been sufficient had the indictment charged a malicious shooting.⁵

A different question arises where the defendant, wishing to kill A, sees B, and believing him to be A, assaults him. The indictment for an assault on B with intent to injure him, though sometimes treated as a case of constructive specific intent,⁶ would seem to be a case of actual intent, since the defendant did in fact intend to injure the person before him, though his motive was to injure another.⁷

It is clear that negligence, however gross, cannot supply the place of specific intent;⁸ though it may often furnish very

¹ Reg. v. Latimer, 17 Q. B. D. 359, 16 Cox C. C. 70, K. 144, M. 163; Walls v. S., 90 Ala. 618, 8 So. 680; Bush v. S., 136 Ala. 85, 33 So. 878.

² C. v. Murphy, 165 Mass. 66, 42 N. E. 504. The decision was probably influenced by the nature of the crime; see § 28, *ante*.

³ Reg. v. Hewlett, 1 F. & F. 91; Lacefield v. S., 34 Ark. 275. In Rex v. Williams, 1 Moo. 107, the defendant was convicted on an indictment for killing a sheep with intent to steal the whole carcass where the evidence showed an intent to steal part only.

⁴ Scott v. S., 49 Ark. 156, 4 S. W. 750; *contra*, P. v. Rahe, 92 Mich. 165, 52 N. W. 625.

⁵ Rex v. Bailey, R. & R. 1, *ante*, § 33.

⁶ Reg. v. Lynch, 1 Cox C. C. 361.

⁷ Reg. v. Smith, 7 Cox C. C. 51; Reg. v. Stopford, 11 Cox C. C. 613; *contra*, Rex v. Holt, 7 C. & P. 518, M. 169; Reg. v. Ryan, 2 Moo. & R. 213.

⁸ U. S. v. Moore, 2 Low. 232, Fed. Cas. No. 15,803. Compare U. S. v. Thomson, 12 Fed. 245.

strong grounds for inferring the existence in fact of the specific intent, a matter which will be discussed under the various crimes where the question arises.

CRIMINAL CAPACITY.

§ 35. **Who May Become Criminal.**—No person can be guilty of a crime unless he has both mental and physical capacity.

§ 36. **Infants**, therefore, are not amenable to the criminal law until they have reached that degree of understanding which enables them to appreciate the quality of the act. The law fixes this limit arbitrarily, for the sake of convenience, at the age of seven years, and will not listen to evidence that a person below this age is capable of understanding the quality of his act. Between the ages of seven and fourteen, with some exceptions, the presumption is that the infant lacks discretion or criminal capacity, and the burden of proof that he has such capacity is upon the prosecutor.¹ If there be no evidence upon this point the prosecution fails. It would seem that the prosecution would also fail unless, when all the evidence is in, the jury is convinced beyond a reasonable doubt of the defendant's criminal responsibility.² The burden of raising this doubt, to begin with, would seem to be upon the defendant; he must, either by his appearance or other evidence, raise a reasonable doubt in the minds of the jury as to his being over fourteen.³ There are two generally admitted exceptions to this rule,—a female under the age of ten years being conclusively presumed to be incapable of consenting to sexual intercourse, and a male under fourteen being conclusively presumed to be incapable of committing rape.⁴ In Ohio this

¹ *Harrison v. S.* (Ark.), 78 S. W. 763; *Angelo v. P.*, 96 Ill. 209; *C. v. Mead*, 10 Allen (Mass.), 398; *S. v. Doherty*, 2 Overt. (Tenn.) 80.

² *Godfrey v. S.*, 31 Ala. 323, M. 252; *S. v. George*, 4 Penne. (Del.) 57, 51 Atl. 745; *Heilman v. C.*, 84 Ky. 457, 1 S. W. 731; *S. v. Tice*, 90 Mo. 112, 2 S. W. 269; *S. v. Goin*, 9 Humph. (Tenn.) 175; *Law v. C.*, 75 Va. 885.

³ Compare *S. v. Arnold*, 13 Ire. (N. C.) 184, M. 255.

⁴ *Reg. v. Philips*, 8 C. & P. 736; *Reg. v. Jordan*, 9 C. & P. 118; except, indeed, by being present, aiding and abetting: *Law v. C.*, 75 Va. 885.

presumption is held to be disputable;¹ and in Massachusetts it has been held by a divided court that a boy under the age of fourteen may be guilty of an assault with intent to commit rape, on the theory that penetration only is necessary to the consummation of the crime.² In California, by statute, all infants under fourteen are incapable.³

After the age of fourteen, the presumption is that the infant has criminal capacity, and the presumption is sufficient, if not met by counter proof, to warrant the jury in finding the fact. But the defendant may prove his incapacity.⁴ An exception to this last rule, in the nature of physical incapacity, is where an infant over fourteen fails in some public duty, as to repair a highway. In this case he is held incapable, as he has not command of his fortune till he arrives at his majority.⁵

§ 37. **Coercion. Fraud.**—Married women are presumed to be so far under the control and coercion of their husbands, that in many cases they are not held responsible for crimes committed in their presence.⁶ The defence is a technical one, and applies only when the parties are husband and wife and the act is done in the husband's presence. Where the husband is not present there is no presumption of coercion;⁷ but she may be in his presence, although for the time out of his sight or

¹ *Williams v. S.*, 14 O. 222. See also *Heilman v. C.*, 84 Ky. 457, 1 S. W. 731; *S. v. Jones*, 39 La. Ann. 935, 3 So. 57; *P. v. Randolph*, 2 Park. Cr. R. (N. Y.) 174.

² *C. v. Green*, 2 Pick. (Mass.) 380. But see also, upon this point, *Rex v. Eldershaw*, 3 C. & P. 396; *C. v. Lanigan*, 2 Boston Law Reporter, 49, Thatcher, J.; *P. v. Randolph*, 2 Park. C. R. (N. Y.) 174; *S. v. Sam, Winston* (N. C.), 300.

³ Rev. Stat. 1852, c. 99.

⁴ *Rex v. Owen*, 4 C. & P. 236; *Marsh v. Loader*, 14 C. B. N. S. 535; *Rex v. York*, and note, 1 Lead. Cr. Cas. 71; *Reg. v. Smith*, 1 Cox C. C. 260; *C. v. Mead*, 10 Allen (Mass.), 398; *P. v. Davis*, 1 Wheeler (N. Y.), C. C. 230; *S. v. Learnard*, 41 Vt. 585.

⁵ 1 Hale P. C. 20.

⁶ 1 Hale P. C. 44; *Reg. v. Smith*, D. & B. 553, K. 65; *C. v. Eagan*, 103 Mass. 71.

⁷ *C. v. Tryon*, 99 Mass. 442. See *Rex v. Hughes*, 2 Lewin C. C. 229, M. 110; *Rex v. Morris*, R. & R. 270.

not in immediate proximity to him.¹ The older rule seems to have been that these facts being shown, the presumption of coercion was conclusive.² It is now well established that this presumption is only *prima facie*, and may be rebutted by evidence that the woman was not coerced, but acted voluntarily, according to her own pleasure.³ There are exceptions to this incapacity of married women, upon which, however, the authorities are not agreed. She seems to be responsible for treason and murder, by the general consent of the authorities, and perhaps for robbery, perjury, and forcible and violent misdemeanors generally.⁴ It has been asserted, however, that there are no actual *decisions* that the defence of coercion may not be set up even for these crimes.⁵ In certain minor offences relating to the management of the house, such as keeping a disorderly house, the doctrine of coercion is not recognized.⁶

But there are cases of a non-consenting will, as where one is compelled, by fear of being put to death, to join a party of rebels, or is entrapped into becoming the innocent agent of another, whereby a person unwittingly or unwillingly, rather than through incapacity, becomes the instrument of crime wielded by the hand of another. The will is constrained by fear or deceived by fraud into what is only an apparent consent.⁷ The fact that the defendant was acting as the mere agent or

¹ Connolly's Case, 2 Lewin C. C. 229, M. 110; C. v. Munsey, 112 Mass. 287.

² Anon., Kel. 31, K. 66; Rex v. Knight, 1 C. & P. 116, and note.

³ Reg. v. Pollard, 8 C. & P. 553; Reg. v. Cruse, 8 C. & P. 541, K. 66; Rex v. Stapleton, Jebb C. C. 93; S. v. Cleaves, 59 Me. 298; C. v. Butler, 1 Allen (Mass.), 4; Seiler v. P., 77 N. Y. 411, M. 112; Uhl v. C., 6 Grat. (Va.) 706; Miller v. S., 25 Wis. 384, 2 Green's Cr. Law Rep. 286, note; U. S. v. Terry, 42 Fed. 317.

⁴ See the authorities collected in note to C. v. Neal, 1 Lead. Cr. Cas. 81; 3 Greenl. Ev., 15th ed., § 7.

⁵ 1 Bish. New Cr. L., § 358. See Reg. v. Dykes, 15 Cox C. C. 771; P. v. Wright, 38 Mich. 744.

⁶ Reg. v. Williams, 10 Moo. 63; C. v. Cheyney, 114 Mass. 281; S. v. Bentz, 11 Mo. 27.

⁷ Foster Cr. Law, 14; 1 Hale P. C. 50; Steph. Dig. Cr. Law, art. 31; Rex v. Crutchley, 5 C. & P. 133. See *post*, § 68.

servant of another in the commission of a crime will not excuse him.¹

§ 38. **Corporations**, being impersonal, and merely legal entities, without souls, as it has been said, though incapable of committing those crimes which can only proceed from a corrupt mind, may nevertheless be guilty of a violation not only of statutory but common law obligations both by omission, and, by the greater weight of authority, by commission. They cannot commit an assault, though they may be held civilly responsible for a tort committed by their agent.² Nor can they commit any crime involving a criminal intent. But they may create a nuisance, through the acts of their agents, and by the very mode of their operations. Thus corporations may be indicted for nuisance in obstructing a highway,³ in which case they are subject to indictment and punishment by fine, or even the abrogation of their charter, — the only punishments applicable to a corporation; the latter a sort of capital punishment, inflicted when the corporation has forfeited the right to live.⁴

A corporation is also indictable for negligence in the non-performance of the duties imposed upon it by its charter, or otherwise by law.⁵ It has been held in some cases that a corporation is not indictable for a misfeasance,⁶ — in opposition, however, to the great weight of authority.⁷

While it is thus well established that corporations may be indicted for nuisances both in the way of misfeasances and non-

¹ *C. v. Hadley*, 11 Met. (Mass.) 66.

² Angell & Ames on Corporations. §§ 311, 387.

³ *R. R. Co. v. P.*, 44 Ill. App. 632; *S. v. Ry. Co.*, 77 Ia. 442, 42 N. W. 365; *S. v. R. R. Co.*, 88 Ia. 508, 55 N. W. 727; *S. v. R. R. Co.*, 23 N. J. L. 360; *Ry. Co. v. C.*, 90 Pa. 300; *S. v. R. R. Co.*, 91 Tenn. 415, 19 S. W. 529.

⁴ *Reg. v. Railway Co.*, 9 Q. B. 315; *Delaware Canal Co. v. C.*, 60 Pa. 367; 1 Bish. Cr. Law, §§ 420, 422.

⁵ *Reg. v. Railway Co.*, 3 Q. B. 223; *P. v. Albany*, 11 Wend. (N. Y.) 539.

⁶ *S. v. Great Works, &c.*, 20 Me. 41; *C. v. Swift Run, &c.*, 2 Va. Cas. 362.

⁷ See *C. v. Proprietors, &c.*, 2 Gray (Mass.), 339; 1 Bish. Cr. Law, §§ 420, 422.

feasances, these being liabilities that exist irrespective of criminal intent, it seems by no means clear that the criminal liability of corporations is to be thus limited. A corporation must necessarily act by agents: if it can perform a physical act by them so as to render itself punishable therefor, there seems no reason in principle why it may not also by the same means have a criminal intent attributable to itself as a distinct entity. The civil responsibility of corporations in cases involving intent, as for malicious libel and malicious prosecution, seems to be well established;¹ and it is hard to see why the criminal liability may not similarly be brought home. It has been held that a corporation is liable for intentionally working men over eight hours per day,² so a corporation is punishable for contempt,³ for libel,⁴ and for taking salmon in violation of fishery statutes.⁵

The criminal liability of the corporation, as such, in no wise affects that of the individual members of the corporation who may have connected themselves personally with the criminal act, as by soliciting or abetting or participating in the commission thereof.⁶

§ 39. **Insane Persons.** — Insanity, under which the law includes all forms of mental disturbance, whether lunacy, idiocy, dementia, monomania, or however otherwise its special phenomena may be denominated, is another ground upon which persons are held incapable of committing a crime. Insanity is mental unsoundness. It exists in different forms and degrees. A higher degree of insanity is requisite to protect a person from the consequences of a criminal violation of law, than to relieve him from the obligation of a contract.

§ 40. **Test of Insanity. Knowledge of Right and Wrong.** — Various tests have been proposed by the courts for determin-

¹ 5 Thompson Corp., §§ 6310 *et seq.*

² U. S. v. Kelso Co., 86 Fed. 304, M. 328.

³ Telegram Co. v. C., 172 Mass. 294, 52 N. E. 445; P. v. R. R. Co., 12 Abb. P. R. (N. Y.) 171.

⁴ S. v. Atchison, 3 Lea (Tenn.), 729.

⁵ U. S. v. Packers' Ass'n., 1 Alaska, 217.

⁶ Reg. v. Ry., 9 Q. B. 315; P. v. England, 27 Hun (N. Y.), 139.

ing the fact of insanity. The one which most widely prevails is that laid down by the judges of England in M'Naghten's Case,¹ to wit: if the offender has sufficient mental capacity to know that the act which he is about to commit is wrong and deserves punishment, and to apply that knowledge at the time when the act is committed, he is not in the eye of the criminal law insane, but is responsible. All persons whose minds are diseased or impaired to the extent named, and all whose minds are so weak — *idiots, lunatics*, and the like² — that they have not the sufficiency of understanding and capacity before stated, come under the protection of irresponsibility. And in many jurisdictions this is the only test for insanity.³

§ 41. **Irresistible Impulse.** — Insanity also sometimes appears in the courts in the form of what is called an *irresistible impulse* to commit crime. And though, as we have seen, many jurisdictions do not recognize this as a form of insanity which will excuse from crime, yet in other jurisdictions it is recognized by the courts if it is the product of disease; since an

¹ 10 Cl. & F. 200, K. 43, M. 256.

² *S. v. Richards*, 39 Conn. 591.

³ *Reg. v. Haynes*, 1 F. & F. 666, C. 76, K. 52; *S. v. Johnson*, 40 Conn. 136; *S. v. Kavanaugh*, 4 Penne. (Del.) 131, 53 Atl. 335; *Spann v. S.*, 47 Ga. 553; *S. v. Shippey*, 10 Minn. 223; *S. v. Huting*, 21 Mo. 464; *S. v. Pike*, 49 N. H. 399; *Flanagan v. P.*, 52 N. Y. 467; *S. v. Brandon*, 8 Jones (N. C.), 463; *Blackburn v. S.*, 23 O. St. 146; *Brown v. C.*, 78 Pa. 122; *C. v. Gearhardt*, 205 Pa. 387, 54 Atl. 1029; *Lowe v. S.*, 44 Tex. Cr. R. 224, 70 S. W. 206; *U. S. v. McGlue*, 1 Curtis (U. S. C. Ct.) 1, Fed. Cas. No. 15,679.

The following States have not only adopted the "right and wrong" test, but have also definitely rejected "irresistible impulse" as affecting the defendant's sanity, holding that it constitutes no defence: *P. v. Hoin*, 62 Cal. 120; *P. v. Owens*, 123 Cal. 482, 56 P. 281; *Davis v. S.*, 44 Fla. 32, 32 So. 822; *S. v. Mowry*, 37 Kan. 369, 15 P. 282; *S. v. Knight*, 95 Me. 467, 50 Atl. 276; *Spencer v. S.*, 69 Md. 28, 13 Atl. 809; *S. v. Scott*, 41 Minn. 365, 43 N. W. 62; *Cunningham v. S.*, 56 Miss. 269, M. 306; *S. v. Berry*, 179 Mo. 377, 78 S. W. 611; *Flanagan v. P.*, *supra*; *S. v. Brandon*, *supra*; *Genz v. S.*, 59 N. J. L. 488, 37 Atl. 69; *S. v. Murray*, 11 Or. 413, 5 P. 55; *S. v. Alexander*, 30 S. C. 74, 8 S. E. 440; *Wilcox v. S.*, 94 Tenn. 106, 28 S. W. 312; *Leache v. S.*, 22 Tex. App. 279, 3 S. W. 539; *S. v. Harrison*, 36 W. Va. 729, 15 S. E. 982, M. 263; *U. S. v. Guiteau*, 10 Fed. 161; *U. S. v. Young*, 25 Fed. 710.

act produced by diseased mental action is not a crime.¹ But an irresistible impulse is not a defence, unless it produced the act of killing. Yielding to an insane impulse which could have been successfully resisted is criminal.² The man who has a mania for committing rape, but will not do it under such circumstances that there is obvious danger of detection,³ and the man who has a mania for torturing and killing children, but always under such circumstances as a sane man would be likely to adopt,⁴ in order to avoid detection, are not entitled to its shelter. This plea is to be received only upon the most careful scrutiny.⁵

§ 42. **Emotional Insanity**, which is a newly discovered, or rather invented, phase of irresistible impulse, and is nothing but the fury of sudden passion driving a person, otherwise sane, into the commission of crime, is utterly repudiated by the courts as a ground of irresponsibility.⁶

§ 43. **Moral Insanity**,⁷ or that obliquity which leads men to commit crime from distorted notions of what is right and what is wrong, and impels them generally and habitually in a

¹ *Parsons v. S.*, 81 Ala. 577, 2 So. 854; *S. v. Windsor*, 5 Harr. (Del.) 512; *S. v. Felter*, 25 Ia. 67; *Smith v. C.*, 1 Duv. (Ky.) 224; *C. v. Rogers*, 7 Met. (Mass.) 500; *Dejarnette v. C.*, 75 Va. 867.

In addition to the above-mentioned jurisdictions the following seem directly or indirectly to recognize irresistible impulse as a defence: *Greene v. S.*, 64 Ark. 523, 43 S. W. 973; *S. v. Johnson*, 40 Conn. 136; *Quattebaum v. S.*, 119 Ga. 433, 46 S. E. 677; *Dacey v. P.*, 116 Ill. 555, 6 N. E. 165; *Goodwin v. S.*, 96 Ind. 550; *Plake v. S.*, 121 Ind. 433, 23 N. E. 273; *Burgo v. S.*, 26 Neb. 639, 42 N. W. 701; *Blackburn v. S.*, 23 O. St. 146; *Brown v. C.*, 78 Pa. 122; *Lowe v. S.*, 118 Wis. 641, 96 N. W. 417.

² *S. v. Jones*, 50 N. H. 369; *S. v. Felter*, 25 Ia. 67.

³ See testimony of Blackburn, J., before the Parliamentary Committee on Homicide, cited in Wharton on Homicide, § 582, note.

⁴ *C. v. Pomeroy*, 117 Mass. 143.

⁵ *Scott v. C.*, 4 Met. (Ky.) 227; *Hopps v. P.*, 31 Ill. 385; *C. v. Mosler*, 4 Barr (Pa.), 264, M. 260; *U. S. v. Hewson*, 7 Boston Law Repr. 361 (U. S. C. Ct.), Fed. Cas. No. 15,360, Story, J.

⁶ *Parsons v. S.*, 81 Ala. 577, 2 So. 854; *P. v. Bell*, 49 Cal. 485; *S. v. Johnson*, 40 Conn. 136; *Willis v. P.*, 5 Parker C. C. (N. Y.) 621; see also a very vigorous article upon the subject, 7 Alb. Law Jour. 273. Upon the general subject of insanity as a defence, see *C. v. Rogers*, 1 Lead. Cr. Cas. 94, and note.

⁷ The French call it "moral self-perversion."

criminal direction, as distinguished from mental insanity, though appearing to have the sanction of the medical faculty as a doctrine founded in reason and the nature of things, is scouted by many of the most respectable courts as unfounded in law;¹ and although accepted to a limited extent by others, it is treated even by them as a doctrine dangerous in all its relations, and to be received only in the clearest cases.² It may also be observed, that moral insanity is sometimes confounded with, and sometimes distinguished from, irresistible impulse. In Pennsylvania, for instance, very recently, the existence of such a kind of insanity seems to have been recognized; but it was said to bear a striking resemblance to vice, and ought never to be admitted as a defence without proof that the inclination to kill is irresistible, and that it does not proceed from anger or other evil passion.³ Hence many cases appear to be in conflict which in fact are not irreconcilable. The absence of clear definitions is a serious embarrassment in the discussion of the subject.

The fundamental question with which the court is concerned in these cases is not the sanity or insanity of the defendant, *per se*. That is material only in so far as it bears on the only point with which the court is concerned, viz., his punishability. With this idea in mind, the courts of some States have given up attempting to lay down any fixed rule as to sanity and have instructed the jury that the question for their decision is whether or not the defendant was in a criminally responsible state of mind at the time he did the act complained of. This practice, though apparently leaving greater scope to the jury, seems correct on principle, and makes for simplification of the doctrines on this subject.⁴

¹ *P. v. McDonell*, 47 Cal. 134; *Anderson v. S.*, 43 Conn. 514; *Choice v. S.*, 31 Ga. 424; *Humphreys v. S.*, 45 Ga. 190; *S. v. Lawrence*, 57 Me. 574; *S. v. Brandon*, 8 Jones (N. C.), 463; *Farrer v. S.*, 2 O. St. 54; *U. S. v. Holmes*, 1 Cliff. (U. S. C. Ct.) 98, Fed. Cas. No. 15,382; and cases before cited on the general topic, *ante*, § 39. See also Wharton on Homicide, § 583.

² See Wharton on Homicide, §§ 583 *et seq.*

³ *C. v. Sayre* (Pa.), 5 Weekly Notes of Cas. 424.

⁴ *Parsons v. S.*, 81 Ala. 577, 2 So. 854; *S. v. Pike*, 49 N. H. 399; *S. v.*

§ 44. **Insanity at Time of Trial.** — An offender cannot be tried, sentenced, or punished for crime while insane. The test of insanity is, however, different in this case from the test in the ordinary case. Insanity which prevents a trial is not inability to distinguish right from wrong, but mental incapacity to make a rational defence, or to understand the meaning of punishment.¹

§ 45. **Proof of Insanity.** — As a question of evidence, the burden of proof of sanity is upon the government in all cases. The act must not only be proved, but it must also be proved that it is the voluntary act of an intelligent person. Where the will does not co-operate, there is no intent. But as sanity is the normal state of the human mind, the law presumes every one sane till the contrary is shown; and this presumption, in the absence of evidence to the contrary, is sufficient to sustain this burden of proof. If, however, the defendant can, by the introduction of evidence, raise a reasonable doubt upon the question of sanity, he is to be acquitted. This is the better rule, supported by many authorities.²

In other of the States, however, it is held that, if the prisoner sets up insanity in defence, he must prove it by a preponderance of evidence, or it is of no avail. It is not enough for him to raise a reasonable doubt on the point.³ In New York, the authorities seem to be conflicting.⁴

Jones, 50 N. H. 369, M. 275. See also *P. v. Finley*, 38 Mich. 482; *S. v. Keerl* (Mont.), 75 P. 362.

¹ *Freeman v. P.*, 4 Denio (N. Y.), 9.

² *S. v. Johnson*, 40 Conn. 136; *Davis v. S.*, 44 Fla. 32, 32 So. 822; *Chase v. P.*, 40 Ill. 352; *Dacey v. P.*, 116 Ill. 555, 6 N. E. 165; *Polk v. S.*, 19 Ind. 170; *Plake v. S.*, 121 Ind. 433, 23 N. E. 273; *S. v. Crawford*, 11 Kan. 32, 32 Am. Law Reg. n. s. 21, and note; *C. v. Pomeroy*, 117 Mass. 143; *P. v. Garbutt*, 17 Mich. 9; *Cunningham v. S.*, 53 Miss. 269, M. 306; *Wright v. P.*, 4 Neb. 407; *Burgo v. S.*, 26 Neb. 639, 42 N. W. 701; *S. v. Jones*, 50 N. H. 369; *Faulkner v. Terr.*, 6 N. Mex. 464, 30 P. 905; *P. v. Tobin*, 176 N. Y. 278, 68 N. E. 359; *Maas v. Terr.*, 10 Okl. 714, 63 P. 960; *Dove v. S.*, 3 Heisk. (Tenn.) 318; *Revoir v. S.*, 82 Wis. 295, 52 N. W. 84; *Davis v. U. S.*, 160 U. S. 469, with large collection of cases.

³ *Gunter v. S.*, 83 Ala. 96, 3 So. 600; *Casat v. S.*, 40 Ark. 511; *P. v.*

⁴ *Wagner v. P.*, 4 Abb. App. (N. Y.) 509; *P. v. McCann*, 16 N. Y. 58 (*semble*); *Flannagan v. P.*, 52 N. Y. 467; *P. v. Tobin*, 176 N. Y. 278, 68 N. E. 359.

In New Jersey, it seems to be the law that the prisoner must prove the defence of insanity beyond a reasonable doubt.¹ So also in Louisiana,² and, by statute, in Oregon.³

§ 46. **Voluntary Drunkenness**, as a rule, is not regarded by the law as an excuse for the commission of a crime while under its influence, since one who under such circumstances perpetrates a crime is deemed to have procured, or at least consented to, that condition of things by which the commission of the crime became more probable. Although intoxication, according to its degree, may cloud or eventually obscure the reason for the time being, and excite the passions of man, if it be the result of voluntary and temporary indulgence, it cannot be regarded either in excuse, justification, or extenuation of a criminal act. If privately indulged in, it may not be a crime in itself. It is nevertheless so far wrongful as to impart its tortious character to the act which grows out of it.⁴ It was said by Coke,⁵ and has been sometimes repeated by text-writers since, that the fact of intoxication adds aggravation to the crime committed under its influence; but this seems not to have the authority of any well-adjudged case, nor to be well founded in reason. It cannot, for instance, aggravate an offence, which in law is only manslaughter if

Best, 39 Cal. 690; *P. v. Bemmerly*, 98 Cal. 299, 33 P. 263; *Lee v. S.*, 116 Ga. 563, 42 S. E. 759; *P. v. Walter*, 1 Ida. 386; *S. v. Felter*, 32 Ia. 49; *S. v. Thiele*, 119 Ia. 659, 94 N. W. 256; *S. v. Coleman*, 27 La. Ann. 691; *S. v. Lawrence*, 57 Me. 574; *Bonfanti v. S.*, 2 Minn. 123; *S. v. Hanley*, 34 Minn. 430, 26 N. W. 397; *S. v. Huting*, 21 Mo. 464; *S. v. Palmer*, 161 Mo. 152, 61 S. W. 651; *S. v. Lewis*, 20 Nev. 333, 22 P. 241; *S. v. Potts*, 100 N. C. 457, 6 S. E. 657; *Loeffner v. S.*, 10 O. St. 598; *Lynch v. C.*, 77 Pa. 205; *S. v. Bundy*, 24 S. C. 439; *Burt v. S.*, 38 Tex. Cr. R. 397, 40 S. W. 1000; *P. v. Dillon*, 8 Utah 92, 30 P. 150; *Boswell v. C.*, 20 Grat. (Va.) 860; *S. v. Strauder*, 11 W. Va. 745, 823.

¹ *S. v. Spenser*, 1 Zab. (21 N. J. L.) 202.

² *S. v. De Rancé*, 34 La. Ann. 186, M. 302.

³ *S. v. Murray*, 11 Or. 413, 5 P. 55.

⁴ *Beverley's Case*, 4 Co. 123 *b*, 125 *a*; *P. v. Lewis*, 36 Cal. 531; *Raferty v. P.*, 66 Ill. 118; *C. v. Hawkins*, 3 Gray (Mass.), 463; *P. v. Garbutt*, 17 Mich. 9; *Flanigan v. P.*, 86 N. Y. 554.

⁵ Coke Litt. 247.

committed by a sober man, into murder if done by a drunken one; nor generally lift a minor offence into the category of a higher grade. If intoxication be a crime, it may be punished distinctively; but the punishment of intoxication should not be added to that of the crime committed under its influence. If this were permissible, greater responsibility would attach to the intoxicated than to the sober man, in respect of the particular offence.¹

§ 47. **Intoxication. Specific Intent.** — When, however, in the course of a trial, a question arises as to the particular state of mind of the accused at the time when he committed a crime, — as, for instance, whether he entertained a specific intent, or had express malice, or was acting with deliberation, — the fact of intoxication becomes an admissible element to aid in its determination; not as an excuse for the crime, but as a means of determining its degree. If a man be so drunk as not to know what he is doing, he is incapable of forming any specific intent.² Thus where the common law crime of murder, i. e., killing with malice aforethought, has been divided by statute into murder in the first degree, i. e., killing with deliberate, premeditated malice aforethought, and other murder, proof of drunkenness, by showing that the defendant was too intoxicated to form the intent to kill,³ or that he acted on sudden, though unreasonable, passion,⁴ may reduce murder from the first to the second degree;⁵ or may show such absence of intent as to justify acquittal on a charge of attempt

¹ *McIntyre v. P.*, 38 Ill. 514.

² *Whitten v. S.*, 115 Ala. 72, 22 So. 483, M. 326; *S. v. Johnson*, 40 Conn. 136; *Malone v. S.*, 49 Ga. 210; *McIntyre v. P.*, 38 Ill. 514; *S. v. Bell*, 29 Ia. 316, K. 55; *S. v. Roan*, 122 Ia. 136, 97 N. W. 997; *Roberts v. P.*, 19 Mich. 401; *S. v. Garvey*, 11 Minn. 151; *Schlencher v. S.* (Neb.), 8 Repr. 207; *P. v. Robinson*, 2 Park. C. C. (N. Y.) 235; *Jones v. C.*, 75 Pa. 403.

³ *Reg. v. Doherty*, 16 Cox C. C. 306, C. 187; *P. v. Williams*, 43 Cal. 311; *S. v. Johnson*, 40 Conn. 136; *Jones v. C.*, 75 Pa. 403.

⁴ *Rex v. Thomas*, 7 C. & P. 817, M. 311; *Cartwright v. S.*, 8 Lea (Tenn.), 376.

⁵ *Longley v. C.*, 99 Va. 807, 37 S. E. 339; *Hopt v. P.*, 104 U. S. 631, C. 78.

to kill,¹ burglary,² forgery,³ larceny,⁴ assault with intent to kill,⁵ or other crime involving a specific intent.

But it must be remembered that to show intoxication in this connection is merely to introduce evidence as to the defendant's frame of mind. If, in spite of his intoxication, he was actuated by malice, he will be held for murder.⁶ So, if in spite of his intoxication, he consciously made use of a weapon dangerous to life, the presumption that a man intends the natural and probable consequences of his act is as applicable to the drunken as to the sober man; and the capacity to form the intent to shoot with a deadly weapon implies the capacity to form the intent to kill.⁷

If a person, having formed the intention to kill another, drink in order to nerve himself for the deed, the fact of his intoxication will not reduce the crime, the original malice being taken to continue.⁸

§ 47a. An analogous question arises when the plea of self-defence is set up. Here, too, the defendant may show he was intoxicated, not to excuse his crime, but to show the good faith of his action.⁹ But where the exercise of self-defence leads to a homicide, as distinguished from battery, since the rule is that the defendant must justify his conduct by showing that he acted not only in good faith but reasonably, his intoxication cannot be taken into account.¹⁰ So where the killing was in hot blood.¹¹

¹ *Reg. v. Doody*, 6 Cox C. C. 463, C. 79.

² *S. v. Snow*, 3 Penne. (Del.) 259, 51 Atl. 607; *S. v. Bell*, 29 Ia. 316.

³ *P. v. Blake*, 65 Cal. 275, 4 P. 1. ⁴ *P. v. Walker*, 38 Mich. 156.

⁵ *S. v. Di Guglielmo*, 4 Penne. (Del.) 336, 55 Atl. 350; *S. v. Pasnau*, 118 Ia. 501, 92 N. W. 682; *Roberts v. P.*, 19 Mich. 401. See *Booher v. S.*, 156 Ind. 435, 60 N. E. 156.

⁶ *C. v. Dudash*, 204 Pa. 124, 53 Atl. 756.

In *Wilson v. S.*, 60 N. J. L. 171, 37 Atl. 954, it was said that to excuse the defendant it must appear not only that he did not, but could not, because of intoxication, have any intent. But see s. c. 38 Atl. 428.

⁷ *Marshall v. S.*, 59 Ga. 154. ⁸ *S. v. Robinson*, 20 W. Va. 713.

⁹ *Reg. v. Gamlen*, 1 F. & F. 90, C. 79, K. 54; *Marshall's Case*, 1 Lewin C. C. 76, M. 311.

¹⁰ *Springfield v. S.*, 96 Ala. 81, 11 So. 250; *S. v. Mullen*, 14 La. Ann. 570; *S. v. Davis*, 52 W. Va. 224, 43 S. E. 99.

¹¹ *Rex v. Carroll*, 7 C. & P. 145; *C. v. Hawkins*, 3 Gray (Mass.), 463,

§ 47b. **The Burden of Proof**, where it is urged that drunkenness changes the nature of the crime, by showing the lack of a specific intent, would seem to be the same as with insanity, i. e., the prosecution having made out a *prima facie* case, the defendant need introduce only enough evidence to raise a reasonable doubt as to the existence of the specific intent; and the prosecution must, when all the evidence is in, convince the jury beyond a reasonable doubt, of the existence of all the elements of the crime, including the specific intent.¹

§ 48. **Delirium Tremens. Mental Disease.** — Delirium tremens is rather a result of intoxication than intoxication itself, and is regarded by the law as a disease of the mind, — a temporary insanity. This, like any other mental disease induced by long and excessive indulgence, which impairs the mind or controls its operations to such an extent that the person afflicted cannot distinguish right from wrong, and has not the capacity to know what he does, may relieve from responsibility. Though one may voluntarily and of purpose become intoxicated, and so be held responsible for the natural consequences of the condition which he has sought, he does not intend to become delirious or demented.²

If the defendant, by long indulgence, or for other reasons, has reached such a condition that he is irresistibly driven to drink, or is, as it is sometimes called, a subject of dipsomania or oinomania, it would seem that he should be no more responsible for a crime induced by the intoxication to which he is thus irresistibly driven than should an insane person subject

C. 79; Keenan v. C., 44 Pa. 55, M. 312; Haile v. S., 11 Humph. (Tenn.) 154.

¹ Whitten v. S., 115 Ala. 72, 22 So. 483, M. 326; Davis v. S., 51 Neb. 177, 74 N. W. 599 (*semble*); *contra*, S. v. Kavanaugh, 4 Penn. (Del.) 131, 53 Atl. 335; S. v. Hill, 46 La. Ann., 27, 14 So. 294; S. v. Grear, 29 Minn. 221, 13 N. W. 140.

² Reg. v. Davis, 14 Cox C. C. 563, C. 81; Beasley v. S., 50 Ala. 149; P. v. Williams, 43 Cal. 344; S. v. McGonigal, 5 Harr. (Del.) 510; Maconnehey v. S., 5 O. St. 77; Cornwell v. S., 1 M. & Y. (Tenn.) 147; U. S. v. Drew, 5 Mason (U. S. C. Ct.), 23, Fed. Cas. No. 14,993. Compare S. v. Haab, 105 La. 230, 29 So. 725, M. 320.

to an irresistible impulse.¹ In some cases, however, the courts have refused to recognize this as a defence.²

§ 49. **Involuntary Intoxication**, or that which is induced by the fraud or mistake of another, — as when one is deceived into drinking an intoxicating beverage against his will, or by the advice of his physician drinks for another purpose, — constitutes a valid excuse for crime committed while under its influence. So, doubtless, would one be held excusable who, without negligence, and with the intent to benefit his health or alleviate pain, and not merely to gratify his appetite, had, through his misjudgment or mistake, drunk more than he intended, or than was necessary, to the extent of intoxication. In the absence of intent either to commit crime or to become intoxicated, the essential criterion of crime is wanting.³

But one cannot plead over-susceptibility as an excuse for the excessive indulgence of his appetite. And that degree of indulgence is in him excessive which produces intoxication, though the same amount of indulgence would not ordinarily produce intoxication in others. Voluntary indulgence carries with it responsibility for the consequences.⁴

§ 50. **Ignorance or Mistake of Fact.** — Ignorance or mistake of fact may prevent responsibility for a common law crime. If the offender acted under a *bona fide* belief in a state of facts different from what actually existed, he is to be held responsible only for the act he supposed he was doing; unless that would have been criminal, he is not guilty of a crime. Thus where one was aroused at night by a cry of "Thieves!" and killed a servant, honestly and reasonably believing him to be a burglar, he was held not guilty of homicide.⁵ So where a police officer, charged with the duty of arresting intoxicated

¹ *Ante*, § 41.

² *Choice v. S.*, 31 Ga. 424; *Flanigan v. P.*, 86 N. Y. 554, M. 316.

³ 1 Hale P. C. 32; *Pearson's Case*, 2 Lew. C. C. 144, C. 77.

⁴ *Humphreys v. S.*, 45 Ga. 190.

⁵ *Levet's Case*, 1 Hale P. C. 42, C. 85, K. 26; *Sherras v. De Rutzen*, L. R. 1 Q. B. D. 918, K. 32; *S. v. Nash*, 88 N. C. 618, M. 248. Compare *S. v. Downs*, 91 Mo. 19, 3 S. W. 219; and see, *post*, §§ 214, 235.

persons, arrests a sober person, he is not criminally liable if he acted in good faith and reasonably.¹

§ 51. **Ignorance of Law.** — Knowledge of the criminal law on the part of every person *capax doli* within its jurisdiction is conclusively presumed, upon grounds essential to the maintenance of public order. This fact, therefore, is always taken for granted. Ignorance of the law excuses no one. And this principle is so absolute and universal, that a foreigner recently arrived, and in point of fact not cognizant of the law, is affected by it.² So where an embargo act was passed, at once becoming operative, a vessel leaving a port in a remote part of the country so soon after the passage of the act that it was physically impossible to have learned thereof, was held nevertheless liable.³ To avoid such unjust results it is generally provided in statutes that they shall become operative at some future date. In the lack of such provision, however, the general principle is clear. It rests upon considerations of public policy, the chief of which is that the efficient administration of justice would become impracticable, were the government obliged to prove in every case that the defendant actually had knowledge of the law.⁴

§ 52. **Same Subject. Specific Intent.** — There are cases, however, when there is doubt as to the interpretation of the law, in which it has been held that acting under a mistaken opinion as to its purport may be an excuse. Thus, it is said that when the act done is *malum in se*, or when the law which has been infringed is settled and plain, the maxim, *Ignorantia legis neminem excusat*, will be applied in its rigor; but when the law is not settled, or is obscure, and when the guilty intention, being a necessary constituent of the particular offence, is dependent on a knowledge of the law, or of its existence, — as where one takes property believed to be his own under a claim of right, in ignorance of the existence of

¹ *C. v. Presby*, 14 Gray (Mass.), 65, K. 13, M. 244; *C. v. Cheney*, 141 Mass. 102, 6 N. E. 724. See also *S. v. McDonald*, 7 Mo. App. 510.

² *Ex parte Barronet*, 1 E. & B. 1; *Rex v. Esop*, 7 C. & P. 456.

³ *Brig. Ann*, 1 Gall. 62, Fed. Cas. No. 397.

⁴ See *S. v. Butts*, 3 S. D. 577, 54 N. W. 603.

a law which vests the property in another,¹ or takes illegal fees,² or illegally votes,³ under a mistake as to the meaning of the law, — this rule, if enforced, would be misapplied.

The doctrine as thus stated by the courts seems to involve two distinct questions: first, the relation between specific intent and ignorance of law; and, second, the construction to be put on any given law, as to whether specific intent is meant to be made an element of the act thereby forbidden. As to the first question, as has already been pointed out,⁴ if the purpose of the law, whether common law or statute, is to punish the intentional doing of the forbidden act without the further element that we call specific intent, then ignorance of the law is no excuse. With the common law offences there can be little doubt on the question whether or not, in any case, a specific intent is an essential element in the crime. The same principle, of course, applies to statutory crimes. If the purpose of the statute is to punish simply the intentional doing of the act,⁵ it is immaterial that the defendant acted through ignorance of the law, as in cases where the statute, irrespective of any specific intent, forbids voting in more than one town for the same officer,⁶ or removing a dead body,⁷ or miscegenation.⁸ It being settled that such is the law, it would seem clear as a matter of principle that the fact that the law was obscure,⁹ or that the defendant acted on legal

¹ *Rex v. Hall*, 3 C. & P. 409, C. 84; *Reg. v. Reed*, C. & M. 306; *C. v. Stebbins*, 8 Gray (Mass.), 492, C. 83.

² *Cutler v. S.*, 36 N. J. L. 125, M. 241; *Halstead v. S.*, 41 N. J. L. 552; *P. v. Whalley*, 6 Cow. (N. Y.) 661.

³ *C. v. Bradford*, 9 Met. (Mass.) 268; *S. v. Macomber*, 7 R. I. 349.

⁴ *Ante*, § 51.

⁵ On the question of what statutes are interpreted as punishing the act regardless of any intent, see *post*, §§ 53-58.

⁶ *S. v. Perkins*, 42 Vt. 399.

⁷ *S. v. McLean*, 121 N. C. 589, 28 S. E. 140.

⁸ *Hoover v. S.*, 59 Ala. 57. See also *Fraser v. S.*, 112 Ga. 13, 37 S. E. 114; *S. v. Keller* (Ida.), 70 P. 1051; *Jellico Coal Co. v. C.*, 96 Ky. 373, 29 S. W. 26; *Begley v. C.*, 22 Ky. L. R. 1546, 60 S. W. 847; *C. v. Everson*, 140 Mass. 292, 2 N. E. 839; *Debardeleben v. S.*, 99 Tenn. 619, 42 S. W. 684.

⁹ *Levar v. S.*, 103 Ga. 42, 29 S. E. 467.

advice,¹ while it might be a ground for mitigating the sentence, could not affect his criminal responsibility.

If, on the other hand, the statute expressly requires, in order to render an act punishable, that it should be done "maliciously," or "corruptly," or with any other specific intent, it is equally clear that if, from ignorance of law, or any other reason, that specific intent does not exist, there is lacking one of the elements of the crime. Whenever, therefore, a special mental condition constitutes a part of the offence charged, and such condition depends on the fact whether the party charged had certain knowledge with respect to matters of law, the fact of the existence of such knowledge is open to inquiry. Thus, in a prosecution for maliciously setting fire to furze, proof of a mistaken belief in the offender's right to burn the furze is admissible, since it disproves malice.²

The second question, viz., whether in fact specific intent is, in any given case, made a part of the crime is not always thus specifically answered by the statute. While there is some conflict of authority, it would seem that as a matter of principle the court may conclude from the nature of the evil sought to be remedied, and other reasons, that it was the intent of the legislature to make the act punishable only if done from corrupt motives. Thus, where the mere words of the statute forbade the taking of fees not allowed by law, or voting, when not legally entitled to do so, the court held that the intent was to punish these acts only when done with a corrupt motive and that the defendant's ignorance of the law might be shown in explanation of his conduct.³ Some courts, however, have said that where the statute forbids "fraudulent and wilful" acts, the mere fact that they are done intentionally and with (con-

¹ *S. v. Marsh*, 36 N. H. 196; *S. v. Foster*, 22 R. I. 163, 46 Atl. 833.

² *Reg. v. Towse*, 14 Cox C. C. 327, C. 84; *Goforth v. S.*, 8 Humph. (Tenn.) 37; *Dye v. C.*, 7 Grat. (Va.) 662; *U. S. v. Conner*, 3 McLean 573, Fed. Cas. No. 14,847.

³ *Leeman v. S.*, 35 Ark. 438; *C. v. Shed*, 1 Mass. 227; *C. v. Bradford*, 9 Met. (Mass.) 268; *S. v. Gardner*, 5 Nev. 377; *Cutter v. S.*, 36 N. J. L. 125. M. 241; *P. v. Whaley*, 6 Cow. (N. Y.) 661; *contra*, *S. v. Welch*, 73 Mo. 284. As to acts done under an unconstitutional statute, see *S. v. Godwin*, 123 N. C. 697, 31 S. E. 221.

structive) knowledge that the law forbids it, is in itself sufficient to make it wilful, and hence fraudulent.¹ This reasoning would seem inconsistent with the principles and cases discussed above.

INTENT IN STATUTORY CRIMES.

§ 53. **Statute May Ignore Intent.** — Doubtless, in the earlier history of the common law, only such acts were deemed criminal as had in them the vicious element of an unlawful intent, — acts which were *mala in se*, and indicated some degree of moral obliquity. But this quality has long since ceased to be essential, and at the present day *mala prohibita* — acts made criminal by statute, many of them unobjectionable in a moral aspect, except so far as doing an act prohibited by law may be deemed immoral — constitute no inconsiderable portion of the category of crimes.

To illustrate. The statute prohibits the sale of adulterated milk. A person who sells adulterated milk without knowing it to be adulterated, or even honestly believing it to be pure, is nevertheless guilty of a crime. There are many acts which the law, looking to the protection of the community, seeks to prevent; making it perilous, by making it criminally punishable, to do them. As every one is presumed to know the law, every one knows that the sale of adulterated milk is prohibited. No one is bound to sell milk; but if he do, he is bound to know whether it is adulterated or not; and if he intentionally sell milk without having correctly determined beforehand, as it is in his power to do, whether it is or is not of the character prohibited, he is so far at fault, and to that extent guilty of a neglect of legal duty.² For the same reason, the sale of a single glass of intoxicating liquor, even for a praiseworthy purpose, may or may not be criminal in different jurisdictions, and at different times in the same jurisdiction, according as the legislature, in the interest of the

¹ *S. v. Dickens*, 1 Hay. (N. C.) 406; *S. v. Boyett*, 32 N. C. 336, M. 238; *S. v. Hart*, 51 N. C. 389. Compare *McGuire v. S.*, 7 Humph. (Tenn.) 54, and see *post*, §§ 53 to 58.

² *C. v. Waite*, 11 All. (Mass.) 264.

public good, may provide. The hardship of requiring that a person shall know a fact is no greater than to require that he shall know the law. In other words, where the statute clearly so intends, ignorance of a fact is no more an excuse than ignorance of law. The necessity of a criminal intent may be done away by the legislature, and the criminal act be made the sole element of a crime.¹

§ 54. **Necessity of Intent a Question of Interpretation.** — The question becomes therefore one of interpretation of the criminal statute; and to aid us in this work we have the principle that a statute, other things being equal, is to be interpreted as a modification, not as a repeal, of the common law. On the other hand, however, the legislature has an undoubted right to make the commission of any act, even without criminal intent, a crime. Several theories have been put forward as to the proper interpretation of criminal statutes. According to one theory, the commission of any act forbidden by statute would be a crime, though it was done without criminal intent, unless the statute required such intent.² This theory is, however, usually regarded as too harsh. Another theory, put forward by Brett, J., in *Regina v. Prince*,³ is that the guilty intent must always be shown, even in statutory offences, unless the necessity is expressly done away in the statute. This theory is usually regarded as too narrow.

¹ *Ex parte Barronet*, 1 E. & B. 1; *Rex v. Bailey*, R. & R. C. C. 1, K. 29; *C. v. Boynton*, 2 All. (Mass.) 160. Upon the general subject, see, in addition to the cases already cited, Judge Bennett's note to *Rex v. Wheatly*, 1 Lead. Cr. Cas. 1; *Queen v. Mayor, &c.*, L. R. 3 Q. B. 629; *Reg. v. Prince*, L. R. 2 C. C. R. 154, 1 Am. Cr. Rep. 1, K. 21, M. 173; Steph. Dig. Cr. L., art. 34; *Barnes v. S.*, 19 Conn. 398; *McCutcheon v. P.*, 69 Ill. 601; *Ulrich v. C.*, 6 Bush (Ky.), 400; *S. v. Goodenow*, 65 Me. 30; *S. v. Smith*, 10 R. I. 258; *Lawrence v. C.*, 30 Grat. (Va.) 845; *U. S. v. Anthony*, and Mr. Green's note, 2 Cr. L. R. 215. There are cases to the contrary (*Marshall v. S.*, 40 Ala. 21; *Stern v. S.* 53 Ga. 229; *Williams v. S.*, 48 Ind. 306; *Birney v. S.*, 8 O. 230), which Mr. Bishop approves. But by the settled law of England, and the great weight of authority in this country, the doctrine of the text is the better law. See 12 Am. Law Rev. 469.

² *C. v. Mash*, 7 Met. (Mass.) 472, C. 88.

³ 13 Cox C. C. 138, L. R. 2 C. C. 154.

The true theory seems to lie between these two. The facts of each case should be looked at, and the intention of the legislature, as applied to those particular facts, should be determined by the court. This can be done by a consideration of the general scope of the act, and of the nature of the evils to be avoided.¹

§ 55. **By-Laws and Police Regulations.** — In accordance with this theory, the courts almost universally hold that such minor provisions of the criminal statutes as are adopted for the regulation of the conduct of men in the ordinary affairs of life, such as city by-laws or ordinances and police regulations, are to be interpreted strictly, and infractions of them punished, even if committed without guilty intent. For instance, it has been held not necessary to prove a guilty intent in prosecutions for wrongfully selling liquor,² or oleomargarine,³ for selling adulterated or diseased articles of food or drink,⁴ or for permitting a minor to remain in a billiard saloon.⁵ So an infraction of the building laws would be held punishable, though the owner of the building was ignorant of it.⁶ Upon the same principle, one may be convicted on an indictment for receiving lunatics into his house without a license, though he did not know them to be lunatics.⁷

§ 56. **Immoral Acts.** — When the offender was engaged in

¹ 2 Steph. Hist. Cr. Law. 117; Wills, J., in *Reg. v. Tolson*, 23 Q. B. D. 168, K. 15, M. 178; *C. v. Weiss*, 139 Pa. 247, 21 Atl. 10, M. 205.

² *Barnes v. S.*, 19 Conn. 398; *McCutcheon v. P.*, 69 Ill. 601; *C. v. Boynton*, 2 All. (Mass.) 160; *C. v. Finnegan*, 124 Mass. 324; *S. v. Cain*, 9 W. Va. 559; *U. S. v. Leathers*, 6 Sawy. (U. S. Circ. Ct.) 17, Fed. Cas. No. 15,581. See, *contra*, *Williams v. S.*, 48 Ind. 306; *P. v. Welch*, 71 Mich. 548, 39 N. W. 747.

³ *C. v. Weiss*, 139 Pa. 247, 21 Atl. 10, M. 205; *S. v. Newton*, 50 N. J. L. 534, 14 Atl. 604.

⁴ *S. v. Stanton*, 37 Conn. 421, M. 161; *C. v. Farren*, 9 All. (Mass.) 489; *S. v. Smith*, 10 R. I. 238. See, *contra*, *Teague v. S.*, 25 Tex. App. 577, 8 S. W. 667.

⁵ *S. v. Kinkad*, 57 Conn. 173, 17 Atl. 855; *S. v. Probasco*, 62 Ia. 400, 17 N. W. 607. See, *contra*, *Marshall v. S.*, 49 Ala. 21; *Stern v. S.*, 53 Ga. 229, M. 202.

⁶ Wills, J., in *Reg. v. Tolson*, 23 Q. B. D. 168, K. 15, M. 178.

⁷ *Reg. v. Bishop*, 14 Cox C. C. 404, 5 Q. B. D. 259, C. 86.

an act which is in itself immoral, but is made criminal by statute only under certain circumstances, he is guilty if the circumstances exist, though he believed they did not. Thus, upon an indictment for unlawfully taking an unmarried girl under the age of sixteen from her father's possession, a *bona fide* belief that the girl was over sixteen will not protect the defendant, the act itself being an immoral one.¹

§ 57. **Intent in Other Cases generally Required.** — Where the act forbidden by statute is not in its nature immoral, and the statute is more than a mere regulation of the every-day business of life, the tendency of the authorities is to require a criminal intent, unless the statute expressly does away with such requirement.² The burden of producing evidence of lack of intent is of course on the accused, since intent is ordinarily inferred from the act itself; but if evidence of lack of intent is introduced, the burden of proving it is on the government. Thus, upon an indictment for bigamy, a *bona fide* belief upon reasonable grounds that the defendant's wife was dead at the time of the second marriage is by the better view regarded as entitling the defendant to acquittal.³

JUSTIFICATION FOR CRIME.

§ 58. **Matters of Justification.** — Up to this point we have been considering what elements were sufficient to make a complete crime: thus, as to the physical act, whether it was of a kind to injure the public; whether it was more than preparation; the effect of contributing acts by other persons, etc.;⁴ and as to the criminal state of mind, under what cir-

¹ Reg. v. Prince, 13 Cox C. C. 138, L. R. 2 C. C. 154, K. 21, M. 173; S. v. Ruhl, 8 Ia. 447. See § 28, *ante*.

² Reg. v. Tinkler, 1 F. & F. 513; Anon., Foster Cr. L. (3d ed.) 439; Birney v. S., 8 O. 230; U. S. v. Beaty, Hempst. (U. S. Circ. Ct.) 487, Fed. Cas. No. 14,555; Lee v. Lacey, 1 Cr. C. C. (D. C.) 263, Fed. Cas. No. 8,193.

³ Reg. v. Tolson, 23 Q. B. D. 163, K. 15, M. 178; Squire v. S., 46 Ind. 459, C. 90. See, *contra*, C. v. Mash, 7 Met. (Mass.) 472, C. 88; *post*, §§ 195, 196.

⁴ See §§ 6 to 25 inclusive.

circumstances it existed; the effect thereon of insanity; what amounts to criminal negligence, etc.¹ But though an act has been intentionally committed, which is in its nature punishable, by one who is answerable for his acts, it may nevertheless not be punishable as a crime. The soldier who intentionally shoots an enemy, the sheriff who hangs a condemned murderer or seizes property on execution, are committing acts which are in their nature criminal; yet the act, so far from being punishable, is done in execution of a public duty. It becomes therefore necessary to consider under what circumstances a man may be excused for the commission of what would otherwise be a crime. It will be found that these circumstances are comprehended in the following classes: public authority, defence, and necessity.

§ 59. **Execution or Enforcement of Law.** — Any act done by an officer of the law in execution of a writ or warrant issued by a court of competent jurisdiction is justifiable, whether it be to hang or imprison a man, or to seize his property. And even a private person is justified in preventing by force, even if necessary by taking life, the commission of treason, or of a felony by the use or the threat of violence;² or in arresting and keeping in custody such a traitor or felon, or even in killing him if necessary to prevent his escape.³ Where a person, whether a private citizen or an officer, is rightfully engaged in making an arrest, he is justified in using whatever force is necessary to carry out the law; and if death ensues it is justifiable homicide:⁴ this is true even where the person resisting arrest is a misdemeanor;⁵ the death is inflicted, not as a punishment for the crime, but in the course of enforcing

¹ See §§ 26 to 57 inclusive.

² Foster C. L. 273; 1 East P. C. 271.

³ 1 East P. C. 298.

⁴ *Rex v. Daunt*, 1 Crawf. & D. 166; *S. v. Anderson*, 1 Hill (S. C.), 327; *U. S. v. Rice*, 1 Hughes, 560, Fed. Cas. No. 16,153, M. 394; *U. S. v. Jailer*, 2 Abb. 265, Fed. Cas. No. 15,463; *S. v. Gosnell*, 74 Fed. 734.

⁵ *Clements v. S.*, 50 Ala. 117; *Lynn v. P.*, 170 Ill. 527, 48 N. E. 964; *S. v. Dierberger*, 96 Mo. 666, 10 S. W. 168; *S. v. Garrett*, 60 N. C. 144; *contra. Smith v. S.*, 59 Ark. 132, 26 S. W. 712; *Stephens v. C.* (Ky.), 47 S. W. 229; *C. v. Rhoads*, 23 Pa. Supr. Ct. 512.

the law. Where, however, the offender does not forcibly resist the enforcement of the law, but endeavors to make his escape, the justification for killing no longer exists. It is generally agreed that an escaping misdemeanor cannot be killed even though there be no other way to make the arrest.¹ As to escaping felons, it is sometimes said that the safety of society demands that they be arrested even at the cost of their life.² On the other hand it has been said that it is only active resistance to the enforcement of the law that justifies a killing.³

§ 60. **Authorization by Government.** — Every man is justified in obeying the lawful commands of the government within the jurisdiction of which he is; therefore no act done in pursuance of such command can be a crime. But this justification is good only so long as the party justifying is within the territorial jurisdiction of the government.⁴ Thus the master of an English vessel may justify taking a man on board his vessel at a Chilean port, by order of the Chilean government; but he cannot justify any restraint put upon the man after leaving Chilean territory.⁵

A soldier is bound to obey only the legal orders of his officers. Hence an order to do an obviously unjustifiable act is no defence. Since, however, the soldier must, under severe penalties, obey any legal order, his action is justified if the order is apparently legal and not to do an act clearly unjustifiable.⁶

¹ *Reg. v. Dadson*, 4 Cox C. C. 358; *Handley v. S.*, 96 Ala. 48, 11 So. 322; *Brown v. Weaver*, 76 Miss. 7, 23 So. 388; *Reneau v. S.*, 2 Lea (Tenn.), 720; *contra*, *S. v. Turlington*, 102 Mo. 642, 15 S. W. 141 (statutory).

² *Rex v. Finnerty*, 1 Crawf. & D. 167, note; *Carr v. S.*, 43 Ark. 99; *Head v. Martin*, 85 Ky. 480, 3 S. W. 622; *Jackson v. S.*, 66 Miss. 89, 5 So. 690; *S. v. Roane*, 13 N. C. 58. Compare *S. v. Bryant*, 65 N. C. 327.

³ *Reg. v. Murphy*, 1 Crawf. & D. 20; *Storey v. S.*, 71 Ala. 329.

⁴ *P. v McLeod*, 1 Hill (N. Y.), 377.

⁵ *Reg. v. Leslie*, 8 Cox C. C. 269, C. 151.

⁶ *C. v. Blodgett*, 12 Met. (Mass.) 56; *C. v. Shortall*, 206 Pa. 165, 55 Atl. 952; *U. S. v. Jones*, 3 Wash. C. C. 209, Fed. Cas. No. 15,494; *U. S. v. Clark*, 31 Fed. 710, and cases there cited; *Re Fair*, 100 Fed. 149. Compare *Queen v. Stowe*, 2 Nov. Scot. Dec. 121; *Reg. v. Hutchinson*, 9 Cox C. C. 555.

§ 61. **Public Policy.** — Certain other acts may no doubt be justified upon the rather vague ground of public policy. Thus one may justify the destruction of public property in time of conflagration or pestilence, or the forcible entry on land in time of hostile invasion.¹ So, no doubt, it would be justifiable to disobey a police regulation which forbade all persons to leave their horses unattended in the public street, if the attendant left the horse in order to save life.² So the publication of obscenity is in some cases justifiable, as when it is done in good faith in the promotion of morality, science, or art, as, for instance, by the publication of a medical treatise or of a literary classic;³ and public officials may justify the burning of plague-infected clothing, though it causes such discomfort in the neighborhood as amounts to a public nuisance, if it is a proper and reasonable means to prevent contagion.⁴ Justification of this sort has seldom been set up, probably because common sense usually prevents a prosecution in such a case; and the extent to which courts would go in allowing such a defence cannot be determined.

§ 62. **Authority of a Parent or Master.**⁵ — Of a similar nature is the right of a parent or master to govern and correct his child or apprentice. Any act done in proper correction of a son, scholar, or apprentice is justifiable. It is only for excess of force, or for causeless and cruel punishment, that a criminal prosecution can be brought.⁶ The same principle applies to others having the right and duty to exercise control, as a school teacher or keeper of a poor farm.⁷ A husband has no right to inflict any corporal punishment upon his wife, though he may of course defend himself against attacks.⁸

¹ Cooley, *Const. Limit.*, 5th ed. 739.

² Compare *S. v. Wray*, 72 N. C. 253, M. 209.

³ *Steph. Dig. Cr. L.*, art. 172.

⁴ *S. v. Mayor & Aldermen of Knoxville*, 12 Lea (Tenn.), 146.

⁵ *Post*, § 207.

⁶ 1 East P. C. 261; *Steph. Dig. Cr. L.*, art. 201; *Thompson v. S.* (Tex.), 80 S. W. 623.

⁷ *S. v. Neff*, 58 Ind. 516; *C. v. Randall*, 4 Gray (Mass.), 36; *C. v. Seed*, 5 Clark (C. P. of Phil.), 78, M. 402.

⁸ *C. v. McAfee*, 108 Mass. 458; *P. v. Winters*, 2 Park. C. R. (N. Y.)

10. Compare *S. v. Oliver*, 70 N. C. 60, M. 399.

§ 63. **Defence.** — In defending person or property against an unlawful attack, certain acts are justifiable; but it must in all cases appear that they are both reasonable and necessary. A mere attempt to commit larceny does not justify the owner of the property attacked in killing the offender; nor, if a felon can easily be captured, is it justifiable to kill or maim him. This principle is to be borne in mind in all cases of defence.

The force used in defence must be continued only so long as is necessary. The right of self-defence will not justify one in continuing an affray.¹

§ 64. **Self-defence.**² — In order to defend himself from death or serious bodily harm, one may use such force as is necessary, and even kill as a last resort.³ But this right exists only to meet an actual attack of a mortal or at least serious nature; mere fear of injury in the future, or a desire to avoid the chance of being killed will not justify the taking of life.⁴ On the other hand, to require the person assailed to wait till the blow was actually being delivered or the pistol discharged would render this right of little avail. It is enough that when he meets the deceiver there is then something done that causes a reasonable apprehension of immediate serious injury.⁵ Not only, however, should the danger be present and immediate to justify the right of self-defence but all other reasonable means should be exhausted before killing. If a retreat in safety is possible, it should be tried.⁶ In the old phrase, the party

¹ *Reg. v. Knock*, 14 Cox C. C. 1, C. 192.

² For an exhaustive discussion of the principles of self-defence see an article by Professor J. H. Beale, Jr., in 3 *Columbia Law Rev.* 526; see also *post*, §§ 234, 235.

³ *Foster C. L.* 273; *S. v. Burke*, 30 Ia. 331.

⁴ *Karr v. S.*, 100 Ala. 4, 14 So. 851; *S. v. Westlake*, 159 Mo. 669, 61 S. W. 243; *Brewer v. S.* (Ark.), 78 S. W. 773. Compare *Kennedy v. C.*, 1 Bush (Ky.), 340.

⁵ *Price v. P.*, 131 Ill. 223, 23 N. E. 639; *S. v. Thompson*, 83 Mo. 257; *Goodall v. S.*, 1 Or. 333, M. 413; *S. v. Howard*, 35 S. C. 197, 14 S. E. 481; *Field v. C.*, 89 Va. 690, 16 S. E. 865.

⁶ *Duncan v. S.*, 49 Ark. 543, 6 S. W. 164; *Rowsey v. C.*, 25 Ky. L. R. 841, 76 S. W. 409. Compare *Tompkins v. C.*, 25 Ky. L. R. 1254, 77 S. W. 712.

attacked must "retreat to the wall." Hence where the defendant was assaulted by an old man with a pitchfork, and he could have saved himself by retreat, a killing was not justified.¹ On the other hand, this duty to retreat cannot be imposed upon the assailed party unless it may be expected to produce the result sought, i. e., the avoidance of trouble without danger to the innocent party. If, therefore, retreat, though possible, would put him in a worse position than before, as depriving him of the shelter of his house;² *a fortiori*, if the mere retreating would endanger him, he cannot be expected so to do.

In some jurisdictions a distinction is made between the exercise of the right of self-defence in a case where the person exercising that right is wholly innocent of any share in causing the quarrel, and in a case where the quarrel is mutual. It is sometimes said that in the first case the assailed person need under no circumstances retreat, in order to make the killing justifiable.³ As a matter of both public policy and legal principle it would seem that the other view is clearly preferable.

However the courts may differ on the above matter it is everywhere agreed that if one is the aggressor in an affray, he will not be justified in doing any act in the course of the affray, even if it is done in self-defence,⁴ and this applies not only where he actually begins the attack, but where he by insults or otherwise provokes the deceased to assail him.⁵ But he may withdraw from the affray in good faith, and if he is then pursued and attacked by the other party he may defend himself.⁶ But his right of self-defence revives only after he

¹ *S. v. Donnelly*, 69 Ia. 705, 27 N. W. 369.

² *Eversole v. C.*, 95 Ky. 623, 26 S. W. 816; *Albertz v. U. S.*, 162 U. S. 499.

³ *Reg. v. Knock*, 11 Cox C. C. 1, C. 192; *Beard v. U. S.*, 158 U. S. 550, M. 416. For a discussion of the rise of this doctrine and a collection of the cases, see an article by Professor J. H. Beale, Jr., in 16 Harvard Law Rev. 567.

⁴ *Gibson v. S.*, 89 Ala. 121, 8 So. 98; *Barnett v. S.*, 100 Ind. 171; *S. v. Herrell*, 97 Mo. 105, 10 S. W. 387. Compare *Hjeronymus v. S.* (Tex.), 79 S. W. 313.

⁵ *S. v. Scott*, 41 Minn. 365, 43 N. W. 62.

⁶ *Parker v. S.*, 88 Ala. 4, 7 So. 98; *P. v. Hecker*, 109 Cal. 451, 42 P.

has done enough to make it clear to his opponent, as a reasonable man, that he has in fact withdrawn,¹ and if the inability of his opponent to perceive this is due to the defendant's own act, he cannot kill even in self-defence.²

If an attack on a person is not of such violence as to threaten severe bodily harm, his resistance must stop short of injury to life or limb.³ For instance, one may not take life to prevent an unlawful arrest.⁴ A case may, however, be imagined where even the taking of life would be justifiable in resisting an unlawful arrest, as when the arrest is threatened by outlaws or savages. The danger of such an arrest would be as grave as that of bodily harm.

The assaulted party is not required to make defence to an attack that seems to threaten bodily harm at the risk of himself being guilty if he is mistaken.⁵ If the apprehension of bodily harm is reasonable, the party attacked is justified in doing all that is necessary to avoid the apparent danger, even though no severe harm was in fact intended.⁶ But mere good faith, where the belief is not one that a reasonable man, in the position of the defendant, would have entertained, is not sufficient.⁷

§ 65. **Defence of Another Person.** — Such force as a man may use in defence of himself, he may also use in defence of one dependent on him for protection; as a parent or child, wife,

307; *S. v. Thompson*, 45 La. Ann. 969, 13 So. 395; *S. v. Linney*, 52 Mo. 40; *Stoffer v. S.*, 15 O. St. 47; *Vaiden v. C.*, 12 Grat. (Va.) 717.

¹ *S. v. Dillon*, 74 Ia. 653, 38 N. W. 525; *Jones v. S.* (Miss.), 36 So. 243; *S. v. Smith*, 10 Nev. 106; *McMahon v. S.* (Tex.), 81 S. W. 296.

² *P. v. Button*, 106 Cal. 628, 39 P. 1073, M. 421.

³ *Reg. v. Hewlett*, 1 F. & F. 91, K. 150; *Floyd v. S.*, 36 Ga. 91, M. 412.

⁴ *Creighton v. C.*, 81 Ky. 103; *S. v. Cantieny*, 34 Minn. 1, 24 N. W. 458; *contra*, *Miers v. S.*, 34 Tex. Cr. Rep. 161, 29 S. W. 1074, M. 429.

⁵ *Martin v. C.*, 25 Ky. L. R. 1928, 78 S. W. 1104; *S. v. Miller*, 43 Or. 325, 74 P. 658; *Owens v. U. S.*, 130 Fed. 279.

⁶ *Shorter v. P.*, 2 N. Y. 193.

⁷ *P. v. Glover*, 141 Cal. 233, 74 P. 745; *Cahill v. P.*, 106 Ill. 621; *S. v. Thompson*, 9 Ia. 188; *S. v. Allen*, 111 La. 154, 35 So. 495; *Wesley v. S.*, 37 Miss. 327; *S. v. Berkley*, 109 Mo. 665, 19 S. W. 192; *S. v. Thomson*, 68 S. C. 133, 46 S. E. 941. See 1 Wharton Cr. Law, 10th ed., §§ 488-492.

master, or servant.¹ Every member of the State has the duty of suppressing crime. To fail to do so is in itself a misdemeanor, viz., misprision. When the crime to be suppressed is a felony of violence, whatever force is necessary, even to killing, may be used. This being so, it would seem that the right to kill under these circumstances was not limited to the above relations.² But the exercise of unnecessary force, or for the prevention of a merely threatened felony,³ or on behalf of the wrong doer,⁴ renders the person thus interfering himself criminally responsible.

§ 66. **Defence of Property.**—One may use such reasonable force as is necessary to defend one's property, which is in one's possession, from attack. Thus, reasonable force may be used to oust an intruder from real estate,⁵ or to repel an unlawful attempt to seize a chattel.⁶ And if possession of such property has been unlawfully taken, the owner has the right of immediate recapture.⁷ And if in the defence of the property by reasonable means the assailant is killed the homicide is not punishable.⁸

But the defence or recapture of property must stop short of killing or severe bodily harm. No one merely to defend his property has the right to endanger life.⁹

¹ *Reg. v. Rose*, 15 Cox C. C. 540, C. 194, K. 140; *Patten v. P.*, 18 Mich. 314, M. 433; *S. v. Prater*, 52 W. Va. 132, 43 S. E. 230.

² *S. v. Maloy*, 44 Ia. 104; *S. v. Westfall*, 49 Ia. 328; *Saylor v. C.*, 97 Ky. 184, 30 S. W. 390. Compare *S. v. Totman*, 80 Mo. App. 125, 2 Mo. App. Repr. 546.

³ *P. v. Cook*, 39 Mich. 236.

⁴ *Guffee v. S.*, 8 Tex. App. 187, M. 437.

⁵ *C. v. Clark*, 2 Met. (Mass.) 23.

⁶ *C. v. Kennard*, 8 Pick. (Mass.) 133; *Filkins v. P.*, 69 N. Y. 101; *S. v. Yancey*, 74 N. C. 244.

⁷ *C. v. Donahue*, 148 Mass. 529, 20 N. E. 171, C. 157; *Anderson v. S.*, 6 Baxt. (Tenn.) 608, M. 449.

⁸ *S. v. Thompson*, 71 Ia. 503, 32 N. W. 476. Compare *S. v. Merrill*, 2 Dev. (N. C.) 269.

⁹ *Rex v. Sculley*, 1 C. & P. 319, K. 139; *Storey v. S.*, 71 Ala. 338; *S. v. Dooley*, 121 Mo. 591, 26 S. W. 558; *S. v. Zellars*, 7 N. J. L. 220; *S. v. Morgan*, 3 Ired. (N. C.), 186; *S. v. Brandon*, 8 Jones (N. C.), 463; *Montgomery v. C.*, 98 Va. 840, 36 S. E. 371.

§ 67. **Defence of the "Castle."** — The law allows a certain protection to one's dwelling-house which is not given to ordinary property; and some acts of defence are allowable in one's dwelling-house which could not be lawfully committed outside. For instance, where one is attacked and retreats, he need retreat no farther than the threshold of his dwelling. Any force, even to killing, is allowable to keep out of one's dwelling an assailant who threatens death or severe bodily harm.¹ And one who is attacked while in his dwelling-house by an assailant outside is justified in keeping his assailant outside the house by the use of any necessary force.² This applies, not only to the house, but to any place where the defendant is entitled to be protected and unmolested.³ On the other hand, since the basis of the right is defence against felonies of violence, it follows that where the defendant had no reasonable ground to anticipate such, a killing is not justifiable.⁴

It has been said in the authorities that any force, even death, is justifiable in putting out of one's dwelling-house one who has entered peaceably, though unlawfully, and, having entered, makes a forcible attack on the owner.⁵ It would seem, however, that all other means short of killing should be tried; and that if it is practicable to defend the occupants by other means short of killing, as by the imprisonment of the assailants in the house, this should be done, though the assailant still remains within the house against the owner's will. The case is not now one of defence of the castle, but only of the occupants.⁶

The right of defence of a dwelling-house does not extend to the land about it. One may not kill in order to prevent an aggressor from entering the door-yard.⁷

¹ 1 Hale P. C. 486; *S. v. Middleham*, 62 Ia. 150, 17 N. W. 446; *Bledsoe v. C.*, 9 Ky. L. R. 1002, 7 S. W. 884; *S. v. O'Brien*, 18 Mont. 1, 43 P. 1091, 44 P. 399; *P. v. Rector*, 19 Wend. (N. Y.) 569; *S. v. Martin*, 30 Wis. 216.

² *Rex v. Cooper*, Croke Car. 544, K. 138; *S. v. Patterson*, 45 Vt. 308.

³ *Rex v. Cooper*, *ante*; *Askew v. S.*, 94 Ala. 4, 10 So. 657; *Maury v. S.*, 68 Miss. 605, 9 So. 445.

⁴ *Carroll v. S.*, 23 Ala. 28, M. 451; *P. v. Walsh*, 43 Cal. 447.

⁵ 1 Hale P. C. 486.

⁶ *Wild's Case*, 2 Lewin, 214, K. 116.

⁷ *Lee v. S.*, 93 Ala. 15, 9 So. 407; *Wallace v. U. S.*, 162 U. S. 466.

§ 67a. **Burden of Proof.** — While the burden is on the defendant to introduce evidence of the justification of his conduct, it would seem clear on principle that when all the evidence is in the State must convince the jury, beyond a reasonable doubt, that, all things considered, the defendant is punishable.¹

§ 68. **Necessity.** — It has been said that the pressure of circumstances may be so great as to justify one for an act which, but for such pressure, would be a crime; as where a council, without authority, depose and imprison a governor, to prevent irreparable mischief to the State;² or one of two persons swimming in the sea supported by a plank thrusts the other off, if by so doing one would be saved, and by not so doing both would be lost.³

The exact limits of this doctrine, even if it is sound, cannot be fixed.⁴ It certainly does not justify a party of shipwrecked sailors in killing the weakest of their number, though it seemed the only way to preserve their lives.⁵ It would seem that merely on the ground of necessity the killing of another can never be justified. If circumstances threaten one man's life, there is no principle of law which could justify him in shifting the danger to another man. If, to be sure, one man has secured a *tabula in naufragio*, and another attempts to share it, so endangering the life of the former, he may protect himself; but it is a case not of necessity, but of self-defence. The same would seem to be true in the case put, of deposing a tyrannical governor. In other cases, the principle of public policy, already stated, may justify a crime. Apart from these principles, it is doubtful whether there is any justification in the fact that a crime was committed through so-called necessity, that is, by

¹ Lane v. S., 44 Fla. 105, 32 So. 896; S. v. Porter, 34 Ia. 131; Gravelly v. S., 38 Neb. 871, 57 N. W. 751; P. v. Riordan, 117 N. Y. 71, 22 N. E. 455; S. v. Patterson, 45 Vt. 308. See 17 Am. Law Rev., at 913; *contra*, P. v. Milgate, 5 Cal. 127; S. v. Welsh, 25 S. C. 4; S. v. Ballou, 20 R. I. 607, 40 Atl. 861.

² Rex v. Stratton, 21 St. Tr. 1041.

³ Bacon's Maxims, No. 5. See also U. S. v. Holmes, 1 Wall Jr. (U. S. Circ. Ct.) 1, Fed. Cas. No. 15,383.

⁴ Steph. Dig. Cr. L., art. 32.

⁵ Reg. v. Dudley, 14 Q. B. D. 273, 15 Cox C. C. 624, C. 195, K. 61.

reason of extreme pressure of circumstances. If it is shown, in defence to an indictment for larceny of bread, that it was stolen to save the defendant's life, the question would seem to be whether it is for the interest of the public that such fact should justify larceny. It might well be held for the public interest, in order to prevent the increase of crime, that a man under such circumstances should be held to a choice of evils, starvation or crime, and should not be allowed legally to shift his misfortune to the owner of the bread.¹ If this view were taken, the facts of the case ought not to justify larceny; though they should doubtless be considered in assessing the punishment. On the other hand, where the result of the act is not to shift a loss or burden to another, but to benefit one at the cost of doing an act that ordinarily public policy forbids, it would seem that extreme exigencies might afford a justification. Thus, putting into an embargoed port to avoid sinking,² or joining the enemy to avoid death.³ Just how extreme the exigency must be is not clear.⁴

It would seem that there may be cases of true necessity where the volition of the defendant has no share in the result. Thus where the defendant was indicted for not repairing a road, the fact that it had been entirely washed away was a defence, his duty not extending to rebuilding the road.⁵

§ 69. **Principals and Accessories.** — Criminals guilty of felony are classified by the common law, according to the nearness or remoteness of their connection with the crime committed, into *principals* and *accessories*. In high treason all are principals, on account, it is said, of the heinousness of the crime; and in misdemeanors all are principals, because it is beneath the dignity of the law to distinguish the different shades of guilt

¹ Reg. v. Tyler, 8 C. & P. 616, K. 57; *contra*, Rex v. Crutchley, 5 C. & P. 133.

² Brig James Wells v. U. S., 7 Cranch 22. See also U. S. v. Ashton, 3 Sumn. 13, Fed. Cas. No. 14,470, M. 128.

³ Resp. v. McCarty, 2 Dall. (Pa.) 86. Compare Rex v. McGrowther, Foster's Crown Law, 13, K. 56.

⁴ Compare S. v. Wray, 72 N. C. 253, M. 209, and Bice v. S., 109 Ga. 117, 34 S. E. 202.

⁵ Reg. v. Bamber, 5 Q. B. 279. See also C. v. Brooks, 99 Mass. 431.

in petty crimes.¹ And of principals, in felony, we have those of the *first* and *second degrees*.

A *principal in the first degree* is the perpetrator of the act which constitutes the crime, whether he does it with his own hand, or by the hand of an innocent third person, — the third person being ignorant of the character of the act perpetrated;² where, for instance, a parent puts poison into the hands of his son not yet arrived at the age of discretion, and directs him to administer it, — or one person, by fraud, force,³ threats, or otherwise, induces another to take poison⁴ or to steal, — the fact that the instigator is not actually present is immaterial, if the connection between him and the act be direct, or the crime be committed under such circumstances that no one but the instigator can be indicted as principal. Otherwise, a crime might be committed, and no one would be guilty as principal.⁵

On the other hand the fact that the person actually doing the act was employed so to do, while it would make his employer civilly liable as principal, does not affect his criminal liability as principal,⁶ and the criminal responsibility of the employer as principal in the second degree, or accessory, depends, in general, on the principles explained below. There are, however, certain classes of statutory crimes in which it

¹ 4 Bl. Com. 35; *S. v. Stark*, 63 Kan. 529, 66 P. 243; *Candle v. S.* (Tex.), 74 S. W. 545.

² *Reg. v. Bannen*, 2 Moo. C. C. 309, C. 131; *Bishop v. S.*, 30 Ala. 34; *S. v. Shurtliff*, 18 Me. 368. And it is immaterial whether the act is done through an agent not capable of a criminal intent as a child, *Reg. v. Michael*, *post*; *Reg. v. Manley*, 1 Cox C. C. 104, K. 78; *S. v. Learnard*, 41 Vt. 585; or a grown person acting under a mistake of fact, *Reg. v. Clifford*, 2 C. & K. 202; *Gregory v. S.*, 26 O. St. 510; or a grown person who, though acting for the criminal, has received authority justifying his act, *Reg. v. Bannen*, *ante*.

³ 1 Hale P. C. 514; *Reg. v. Michael*, 2 Moo. C. C. 120, C. 133; *Collins v. S.*, 3 Heisk. (Tenn.) 14.

⁴ *Blackburn v. S.*, 23 O. St. 146.

⁵ 1 Hale P. C. 514; *Vaux's Case*, 4 Coke 44.

⁶ *Winter v. S.*, 30 Ala. 22; *C. v. Hadley*, 11 Met. (Mass.) 66; *Allyn v. S.*, 21 Neb. 593, 33 N. W. 212; *Sanders v. S.* (Tex.), 26 S. W. 62. See *Rex v. Huggins*, 2 Ld. Raymond, 1574, K. 35.

has been held that it is the purpose of the statute to make the employer responsible at all hazards, as opening a saloon on Sunday.¹ The same principle has been applied in a modified form in indictments for criminal libel, the mere fact of publication being held enough to establish a *prima facie* liability on the part of the employer; though this was held rebuttable by showing neither approbation nor criminal negligence as to the publication.² So also with a public nuisance. Though it may be proceeded against by indictment, it is in its nature more closely akin to a public tort than to a crime in the strict sense of the term, and it has been held that the employer may be held directly responsible therefor, although the acts complained of were done by his servants.³

When several persons participate in an act, each doing a part and neither the whole, as where several take part in a single burglary, all are principals in the first degree.⁴ If, however, a person does not take a share in the doing of the crime charged he is not responsible as joint principal; as where A and B start out to rob X, and A drops out before the robbery takes place;⁵ so where A, a servant, is indicted as joint principal in larceny, and it appears that he intentionally went away and left the door unlocked, but that B did the actual taking;⁶ and so of any case where the criminal act charged was not in fact jointly done.⁷ But if a person has co-operated in a plan and started to carry it out jointly, it seems clear that a mere mental withdrawal will not free him from liability as principal, since his companion would still in fact be acting in reliance upon and encouraged by him. He must at least do enough to show his fellow conspirator,

¹ *P. v. Roby*, 52 Mich. 577, 18 N. W. 365; *S. v. McCance*, 110 Mo. 398, 19 S. W. 648; *ante*, §§ 53, et seq.

² *Rex v. Ahnon*, 5 Burr. 2686, K. 38.

³ *Reg. v. Stephens*, L. R. 1 Q. B. 702.

⁴ *Rex v. Kirkwood*, 1 Moo. C. C. 304, C. 135. So where several parties unite to make a forgery, *Rex v. Bingley*, R. & R. 446.

⁵ *Rex v. Richardson*, 1 Leach, 4th ed. 387.

⁶ *Reg. v. Jeffries*, 3 Cox C. C. 85, M. 464; *Reg. v. Tuckwell*, C. & M. 215. Compare *Rex v. Jordan*, 7 C. & P. 432.

⁷ *Reg. v. McPhane*, 1 C. & M. 212, M. 465; *P. v. Woody*, 45 Cal. 289.

as a reasonable man, that he is no longer acting with him.¹

Principals in the second degree are those who, without actually participating in the act itself, are present aiding and encouraging the party who commits the act;² as where one undertakes to watch to prevent the principal from being surprised, or to aid him to escape, or in some other way to be of immediate and direct assistance to him in the promotion of his enterprise.³ The principal of the second degree need not be actually on the spot where the crime was committed. Thus, where one, in pursuance of a plan, enticed the owner of a shop to a place at some distance, and kept him there while his confederates broke into the shop, he was held guilty of burglary as principal.⁴

In this way one may be guilty as principal of a crime which he could not commit; for instance, a woman present aiding and abetting may be guilty of rape.⁵

This distinction of the old law, however, between principals of the first and principals of the second degree, is not now regarded with any favor, and in fact it has in many, if not most, of the States become practically obsolete.⁶ Some statutes, however, recognize it, and in some the punishment is based upon the distinction.

§ 70. *Accessories* are divided into two classes,—those *before* and those *after* the fact. An accessory *before* the fact is one who, without being present aiding or abetting, procures, advises, or commands another to commit the crime.⁷ An

¹ *S. v. Allen*, 47 Conn. 121, M. 483.

² *Reg. v. Griffith*, Plowd. 97, K. 73; *Reg. v. Swindall*, 2 C. & K. 230; *Thomas v. S.*, 130 Ala. 62, 30 So. 391; *Mow v. P.*, 31 Colo. 351, 72 P. 1069; *S. v. Lewis*, 4 Penn. (Del.) 332, 55 Atl. 3; *Lamb v. S.* (Neb.), 95 N. W. 1050; *S. v. Hess*, 65 N. J. L. 544, 47 Atl. 806; *S. v. Roberts*, 50 W. Va. 422, 40 S. E. 484.

³ 4 Bl. Com. 36; *Rex v. Owen*, 1 Moo. C. C. 96, C. 137; *C. v. Knapp*, 9 Pick. (Mass.) 496.

⁴ *Breese v. S.*, 12 O. St. 146; and see *S. v. Hamilton*, 13 Nev. 386.

⁵ *S. v. Jones*, 83 N. C. 605.

⁶ 1 Bish. Cr. Law, § 648.

⁷ 4 Bl. Com. 63; *Rex v. Soares*, R. & R. 25, C. 138.

accessory after the fact is one who, knowing¹ the fact that a felony has been committed, receives, relieves, comforts, or assists the felon.² Here, as with a principal in the second degree, mere knowledge or approval, in the lack of any act, will not make a person liable as accessory.³ These distinctions grew out of the rule of the common law, that every offence should be particularly described, so that the party charged might know with reasonable certainty to what he was to answer. The tendency of the modern law is to disregard the distinction, so far as it can be done consistently with the observance of the rules of pleading.⁴

The offences of advising another to commit a felony, the adviser not being present at its commission, and of receiving and concealing stolen goods, are, so far as the circumstantial description is concerned, different from the felonies themselves, and in several of the States the latter has been by statute made a distinct and substantive offence, punishable whether the principal felon has or has not been tried and convicted, though under the ancient common law the accessory could be put upon his separate trial only in case the principal had been tried and convicted.⁵ This rule was adopted to avoid the absurdity of convicting an accessory and afterwards acquitting the principal. And where now the accessory may be tried before or after the principal is convicted, if after-

¹ *Rex v. Greenacre*, 8 C. & P. 35; *Reg. v. Butterfield*, 1 Cox C. C. 39, M. 499; *Whorley v. S.* (Fla.), 33 So. 849; *S. v. Empey*, 79 Ia. 460, 44 N. W. 707. That it is enough if the defendant had good reason to believe the person a criminal, see *Tully v. C.*, 13 Bush (Ky.), 142, *Dent v. S.*, 43 Tex. Cr. Rep. 126, 65 S. W. 627.

² 4 Bl. Com. 37; *P. v. Garnett*, 129 Cal. 364, 61 P. 1114; *Miller v. S.* (Tex.), 72 S. W. 996.

³ *P. v. Garnett*, 129 Cal. 364, 61 P. 1114; *Walker v. S.*, 118 Ga. 10, 43 S. E. 856; *S. v. Wolf*, 112 Ia. 458, 84 N. W. 536.

⁴ *P. v. Newberry*, 20 Cal. 439; *Pearce v. T.*, 11 Okl. 438, 68 P. 504; *Campbell v. C.*, 84 Pa. 187, M. 492. Ch. 91, § 2, 24 & 25 Vict. makes accessories before the fact and principals in the second degree indictable as if they alone had committed the act, although any other party to the crime may have been acquitted.

⁵ *Simmons v. S.*, 4 Ga. 465; *C. v. Phillips*, 16 Mass. 423. Compare *Starin v. P.*, 45 N. Y. 333; *Bliss v. U. S.*, 105 Fed. 508.

wards, before sentence, the principal be tried and acquitted, the accessory, already convicted, on proof of the acquittal of the principal, will be entitled to his discharge, the statute modifying the common law rule only so far as to allow of the trial of an accessory before or after the conviction of the principal, but not after his acquittal.¹

An accessory before the fact in one State to a felony committed in another State is amenable to the courts of the State where he became accessory, although the principal can only be tried where the felony was committed.²

It matters not how remote the accessory be from the principal. If A through one or more intermediate agents procures a person to commit a felony, he is accessory to the latter as principal; and one may be an accessory after the fact to an accessory before the fact, by aiding and concealing him.³

It is also a principle of the common law that the offence of the accessory cannot be greater than that of the principal.⁴

§ 71. **Commission of a Different Crime.** — A person who advises or assists in the commission of a particular crime cannot be held as principal in the second degree, or as accessory to a principal, who commits a substantially different crime, unless the latter is the natural result of the effort to commit the one advised.⁵ Thus, if a person advises another to beat a third, he is accessory to the beating and its natural consequences, but he is not accessory to the different and additional crime of rape, committed by the principal.⁶ Where one entered a house to commit rape, and his confederate outside, in order to prevent

¹ *McCarty v. S.*, 44 Ind. 214, 2 Green's Cr. Law Rep. 715. A substantially similar statute exists in most of the States, as well as in England. See *post*, § 73.

² *S. v. Chapin*, 17 Ark. 561; *S. v. Wyckoff*, 2 Vroom (N. J.), 65; *contra*, *S. v. Grady*, 34 Conn. 118; *S. v. Ayers*, 8 Baxt. (Tenn.) 96. See also *S. v. Ricker*, 29 Me. 84; *C. v. Smith*, 11 Allen (Mass.) 243; *Adams v. P.*, 1 Const. (N. Y.) 173; *Holmes v. C.*, 25 Pa. 221; 2 Burr's Trial, 440.

³ 2 Hawk. P. C., c. 29, § 1.

⁴ *Ibid.*

⁵ 2 Hawk. P. C., c. 29, § 18; *Saunders's Case*, 2 Plowd. 473, C. 176, K. 81; *Lamb v. P.*, 96 Ill. 73; *S. v. Lucas*, 55 Ia. 321.

⁶ 2 Hawk. P. C., c. 29, § 18; *Watts v. S.*, 5 W. Va. 532.

discovery, killed one who attempted to enter, the one who entered is guilty of the homicide;¹ but the confederate would not be guilty of homicide in case the one who had entered killed the girl by throwing her out of the window, to prevent detection, after his purpose was accomplished.² Murder in the course of robbery or burglary is not an unexpected result, and all confederates are guilty of it;³ and the same is true of murder committed in the course of an attempt to escape from jail, the confederates being armed;⁴ so murder in carrying out a plan to "jump" land and hold it at all hazards.⁵ The rule has been stated generally in England by Lush, J., at *Nisi Prius*, that, if several persons agree together to commit a criminal act in a particular way, each is responsible for the acts of the others done in the way agreed on, but not for acts done in any other way. If, for instance, A and B agree to assault C with their fists, each is responsible for the consequences of an assault by the other with the fists. But A is not responsible, if B, without his knowledge, uses a knife, for the consequences of any injury by the knife.⁶ But it may be doubted if this is sound law.⁷

§ 72. **No Accessories in Misdemeanors.**—In misdemeanors all are principals, and so the common law seems to have held of treason. To felonies, therefore, the distinction is confined.⁸

§ 73. **Accessories in Manslaughter.**—At common law it was once held that one could not be accessory before the fact to manslaughter, because that offence was in its nature sudden and unpremeditated.⁹ But it has been said by high authority that Lord Hale in thus stating the law alludes only to cases

¹ *Mercersmith v. S.*, 8 Tex. App. 211, M. 477.

² *P. v. Knapp*, 26 Mich. 112.

³ *Ruloff v. P.*, 45 N. Y. 213; *S. v. Davis*, 87 N. C. 514; *S. v. Johnson*, 7 Ore. 210.

⁴ *S. v. Allen*, 47 Conn. 121, M. 483.

⁵ *Weston v. C.*, 111 Pa. St. 251, 2 Atl. 191.

⁶ *Reg. v. Caton*, 12 Cox C. C. 624, K. 119.

⁷ See 4 Bl. Com. 37; *Foster Crim. Law*, 369.

⁸ *Reg. v. Greenwood*, 2 Den. C. C. 453; *C. v. McAtee*, 8 Dana (Ky.), 28; *C. v. Ray*, 3 Gray (Mass.), 441; *Williams v. S.*, 12 S. & M. (Miss.) 58; *Ward v. P.*, 6 Hill (N. Y.), 144; *S. v. Goode*, 1 Hawks (N. C.), 463.

⁹ 1 Hale P. C. 437.

of killing *per infortunium*, or in self-defence, and that in other cases of manslaughter there seems to be no reason why there may not be accessories.¹ However this may be, the question becomes unimportant in those States which do not favor the distinction between principals in the first and second degree, and principal and accessory before the fact; and there a man indicted as accessory before the fact to murder may be convicted though his principal may have been convicted of manslaughter only, or even if he have been acquitted.²

Where one employs a second to procure a third person to commit a felony, the first two are accessories to the third principal.³ And this is true, although the first knows not who the third may be.⁴ So one may be accessory after the fact by procuring another to assist the principal.⁵ And where one would become an accessory if the offence instigated should be committed, yet, if before its commission he countermands his advice and withdraws from the enterprise, he is not accessory to any act done after notice actually given of the withdrawal.⁶ He is only accessory to the act which has been committed when the aid is rendered. Thus, where one renders aid after a mortal stroke, but before the consequent death, he is not accessory to the death.⁷

§ 74. **Husband and Wife.** — By the common law the duty of a wife to succor and harbor her husband prevented her from incurring the guilt of an accessory after the fact thereby. But no other relationship was a protection.⁸ By statute, however, in some of the States, other relationships have been made a protection. But though the wife cannot be an accessory after

¹ Erle, J., *Reg. v. Gaylor*, 7 Cox C. C. 253; *Reg. v. Taylor*, 13 Cox C. C. 68. See also *Rex v. Greenacre*, 8 C. & P. 35; *S. v. Coleman*, 5 Port. (Ala.) 32.

² *P. v. Newberry*, 20 Cal. 439. See *ante*, § 70.

³ *C. v. Smith*, 11 All. (Mass.) 243.

⁴ *Rex v. Cooper*, 5 C. & P. 535.

⁵ *Rex v. Jarvis*, 2 M. & R. 40; *S. v. Engeman*, 54 N. J. L. 247, 23 Atl. 676.

⁶ 1 Hale P. C. 618.

⁷ 1 Hale P. C. 602.

⁸ 2 Hawk. P. C., c. 29, § 34.

the fact to her husband as principal, and it is said that for the same reason — relationship and duty to succor and protect — the husband cannot be accessory after the fact to the wife¹ (against the opinion, however, of the older authorities),² yet either may be accessory before the fact to the other as principal.³

§ 75. **Assistance Must Be Personal.** — By a very nice distinction, it is held that he who buys or receives stolen goods, though he may be guilty of a substantive misdemeanor, is not an accessory, because he does not receive or assist the thief personally, it being necessary to constitute an accessory after the fact that the act should amount to personal assistance to the principal;⁴ while he who assists him in further carrying them away, after they have been stolen, is an accessory.⁵ On the other hand, a person who is in fact absent and away from the place where the crime, by previous arrangement, is committed, — as where he entices and keeps away the owner of a store while his confederate robs it, this absence being in furtherance and part of the enterprise, — is not an accessory, but a principal.⁶ And so, on principle, where A, the watchman of the store, in furtherance of a plan to rob, keeps away himself.⁷ So, if he watches for the purpose of giving information, or other aid if necessary.⁸ Mere presence, however, without approval known to the principal, or other encouragement, evidenced by some act, does not make one an accessory.⁹ Nor is one absent, though in some sense aiding, as the stakeholder to a prize-fight, to be regarded as an accessory.¹⁰

¹ 1 Deac. Cr. Law, 15.

² 4 Bl. Com. 38; 1 Hale P. C. 621; 2 Hawk. P. C., c. 29, § 34.

³ Reg. v. Manning, 2 C. & K. 903; Rex v. Morris, R. & R. 270.

⁴ 4 Bl. Com. 38; Reg. v. Chapple, 9 C. & P. 355, K. 82; Loyd v. S., 42 Ga. 221; P. v. Cook, 5 Park. (N. Y.) C. R. 351.

⁵ Rex v. King, R. & R. 339; Norton v. P., 8 Cow. (N. Y.) 137.

⁶ Breese v. S., 12 O. St. 146.

⁷ S. v. Poynier, 36 La. Ann. 572, M. 470.

⁸ Doan v. S., 26 Ind. 495; McCarney v. P., 83 N. Y. 408, M. 468; Leslie v. S., 42 Tex. Cr. R. 65, 57 S. W. 659.

⁹ Walker v. S., 118 Ga. 10, 43 S. E. 856; Clem v. S., 33 Ind. 418; S. v. Wolf, 112 Ia. 458, 84 N. W. 536; S. v. Hildreth, 9 Ired. (N. C.) 440; U. S. v. Jones, 3 Wash. Circ. C. 223, Fed. Cas. No. 15,495.

¹⁰ Reg. v. Taylor, 13 Cox C. C. 68.

§ 76. An **Accomplice** is one who shares in the commission of the crime in such manner that he may be indicted with the principal as a participator in the offence. Therefore, under a statute for unlawfully administering a drug to a pregnant woman with intent to procure a miscarriage, the woman is not an accomplice.¹ Nor is a person who enters into a pretended confederacy with another to commit a crime, and aids him therein for the purpose of detecting him, having himself no criminal intent, either an accessory or an accomplice.² Nor is one who entraps another into the commission of a crime for a like purpose.³ So, under an indictment for betting at tenpins, one who merely takes part in the game, but does not bet, is not an accomplice.⁴

The question whether one is an accomplice usually arises in the course of a trial, as a question of evidence, and is to be determined by the jury, under instructions from the court as to what constitutes an accomplice.⁵ Being *particeps criminis*, his evidence may be regarded as that of a criminal. And it is the usual practice of the courts to advise not to convict upon the uncorroborated testimony of an accomplice.⁶

LOCALITY AND JURISDICTION.

§ 77. **Territorial Jurisdiction.**—As a rule, an offence against the laws of one sovereignty is no offence against the laws of another; and one sovereignty has no jurisdiction over, and will not undertake to punish, crimes committed in another. The jurisdiction of a country extends only to its boundaries, unless it is bounded by the high seas. In case it is so bounded, the government has a quasi territorial jurisdiction over the sea for a distance of three miles from the shore.⁷

¹ *C. v. Boynton*, 116 Mass. 343; *S. v. Hyer*, 39 N. J. L. 598.

² *Rex v. Despard*, 28 How. St. Trials, 346; *S. v. McKean*, 36 Ia. 343.

³ *P. v. Barrie*, 49 Cal. 342; *C. v. Downing*, 4 Gray (Mass.), 29; *S. v. Anone*, 2 N. & McC. (S. C.) 27; *Alexander v. S.*, 12 Tex. 540.

⁴ *Bass v. S.*, 37 Ala. 469.

⁵ *S. v. Schlagel*, 19 Ia. 169; *C. v. Glover*, 111 Mass. 395.

⁶ See *post*, § 130.

⁷ *Reg. v. Keyn*, 13 Cox C. C. 403.

A similar jurisdiction has been exercised over certain bays extending into the body of the country, even where they were over six miles in width.¹

The jurisdiction of the court in which an indictment is found commonly extends only over a single county, or a smaller division of territory, and in such case it is necessary, in order to show jurisdiction in the court, to prove not only that the crime was committed within the jurisdiction of the sovereignty, but also within that portion of it over which the court has jurisdiction.

In many, if not all of the States, it is provided that, whenever a crime is committed within a certain distance of a county line, the courts of either county may have jurisdiction,—a provision rendered necessary to prevent a failure of justice, from inability to prove beyond reasonable doubt the exact spot where the crime was committed.

It is further to be noted, that jurisdiction to try for the commission of a crime is conferred by the law, and not by the consent of parties.²

§ 77a. **Personal Jurisdiction.**—In addition to this territorial jurisdiction which extends over every person within the confines of the State, except foreign sovereigns and their representatives, a State has a qualified jurisdiction over its citizens wherever they may be, in that it can lay commands upon them which it can enforce upon their return to their home State.³

§ 78. **Jurisdiction on the High Seas.**—For the purposes of jurisdiction, a private vessel upon the high seas is to be regarded as a part of the sovereignty whose flag she carries, and crimes committed on board of her while at sea are cognizable only by that sovereignty,⁴ even though committed by a for-

¹ *Reg. v. Cunningham*, Bell C. C. 722; *U. S. Cable Co. v. Anglo-American Tel. Co.*, L. R. 2 App. Cas. 394. See also *C. v. Manchester*, 152 Mass. 230, 25 N. E. 113; s. c., on writ of error, 139 U. S. 240.

² *P. v. Granice*, 50 Cal. 447.

³ See *Dobree v. Napier*, 2 Bing. N. C. 781; *Underhill v. Hernandez*, 168 U. S. 250.

⁴ *Reg. v. Armstrong*, 13 Cox C. C. 184. Compare *U. S. v. Smiley*, 6 Sawy. 640, Fed. Cas. No. 16,317.

eigner.¹ When, however, such vessel comes within the jurisdiction of another civilized power, crimes committed on board of her are cognizable by the power into whose limits she has come,² if they are a breach of the peace of that sovereignty. The sovereignty of the flag still, however, has concurrent jurisdiction.³

Where a crime is committed on the high seas by outlaws, that is, by pirates, any civilized government which captures the pirates has jurisdiction to punish the crime.⁴

§ 79. **Locality of Crime.**—When a crime is committed, its locality is the place where the public is injured, that is, where the act takes effect. Thus, where a force is set in motion in one State or foreign sovereignty, and by continuity of operation takes effect in another, the courts of the latter have jurisdiction to punish the crime as if all the *res gestæ* had taken place within its territory. If, for instance, a man standing on one side of the boundary between two States intentionally discharges a gun at a person standing on the other side of the boundary, and injures him, it has been held that the offence may be punished at the domicil of the injured party.⁵ If this latter State is the one where the force is brought in contact with the injured person it would clearly have jurisdiction because of this latter fact. But it would seem doubtful as a matter of principle whether the mere fact that the injured person was domiciled in a particular State would give that State jurisdiction over the offender; since he owes no personal allegiance to that State nor has he violated its territorial sovereignty.⁶ In accord with what seems to be sound principle it has been held that a defendant is indictable for uttering a

¹ Reg. v. Lopez, 7 Cox C. C. 431.

² Wildenhus's Case, 120 U. S. 1. See P. v. Tyler, 7 Mich. 161, 8 Mich. 320.

³ Reg. v. Anderson, 11 Cox C. C. 198; *post*, § 338.

⁴ The Marianna Flora, 11 Wheat. (U. S.) 1.

⁵ C. v. Macloon, 101 Mass. 1.

⁶ See 1 Bish. Cr. Law, §§ 112 et seq. for some observations tending to limit the doctrine of C. v. Macloon, and compare *post*, this section, and § 81.

forged deed where it is recorded, even though the forgery was committed in another State.¹ So, if a man resident in one sovereignty sends an innocent agent into another, who by means of false pretences obtains money from a person resident in the latter, the principal is guilty of an offence in the latter, and may be punished by its tribunals, if the offender be found within the limits of their jurisdiction.²

On the other hand, the first State, where the chain of events was set in motion, cannot punish for the completed act, since that did not take place within its jurisdiction. Thus where A, standing on the deck of an American vessel, killed B on a foreign vessel, the United States had no jurisdiction over the murder.³

But it is the act, and not the result of the act, which makes a crime; consequently, the crime of murder is committed where the blow is struck, not where the victim dies.⁴

It may happen that an attempt to commit a crime may be indictable in one place, while the crime consummated must be indicted in another; as where one encloses a forged note in a letter, and deposits it in one post-office directed to another, the depositing may be indicted at the former place as an attempt to utter, while the consummated crime may be indicted in the latter place.⁵ On the other hand, a person may be convicted of embezzlement by the tribunals of the State in which he was intrusted with the property em-

¹ *Lindsey v. S.*, 38 O. St. 507. See also *Reg. v. Taylor*, 4 F. & F. 511, C. 125; *S. v. Marmouget*, 10 La. 191, 34 So. 408; *P. v. Adams*, 3 Denio (N.Y.), 190. Compare *Reg. v. Finklestein*, 16 Cox C. C. 107, C. 127; *S. v. Bass*, 97 Me. 484, 54 Atl. 1113; *C. v. Taylor*, 105 Mass. 172, C. 129.

² *S. v. Chapin*, 17 Ark. 561; *Johns v. S.*, 19 Ind. 421; *Adams v. P.*, 1 Const. (N. Y.) 173.

³ *U. S. v. Davis*, 2 Sumn. 482, Fed. Cas. No. 14,932; *accord*, *Rex v. Coombes*, 1 Leach, 4th ed. 388; *S. v. Lake*, 16 R. I. 511, 17 Atl. 552. Compare *Reg. v. Armstrong*, 13 Cox C. C. 184; *P. v. Botkin*, 132 Cal. 231, 64 P. 286.

⁴ *Green v. S.*, 66 Ala. 40, M. 588; *Davis v. S.*, 44 Fla. 32, 32 So. 822; *S. v. Gessert*, 21 Minn. 369; *U. S. v. Guiteau*, 1 Mack. (D. C.) 498.

⁵ *William Perkins's Case*, 2 Lew. C. C. 150; *Reg. v. Burdett*, 3 B. & Ald. 717, 4 B. & Ald. 95; *P. v. Rathbun*, 21 Wend. (N. Y.) 509; *U. S. v. Worrall*, 2 Dall. (U. S.) 384.

bezzled, although the fraudulent conversion took place in another State.¹

§ 80. **Continuing Crime.**—Where a thief steals goods in one county and brings the goods into another, where he is taken with them, he may be indicted for larceny in the county in which he is taken. A robber, however, in one county becomes merely a thief in another, by taking his stolen goods into the latter.² The doctrine has been explained on the rather doubtful ground that there is a continuing trespass, and therefore a new taking and larceny in every jurisdiction into which the goods are brought. The true explanation is probably an historical one.

This rule has never been applied in England to a taking in one sovereignty and bringing into another. It must be proved both that the goods were stolen and that the thief was apprehended within the jurisdiction of some English court.³

In this country the courts of some States have applied to the States the analogy of the counties of England, rather than of the several countries under the jurisdiction of the English sovereign. So it has been held that a larceny of goods in one jurisdiction is a larceny in every jurisdiction where the thief may be found with the stolen goods.⁴ But in other States the contrary view is held, it would seem more correctly.⁵ And an indictment against a receiver of stolen goods alleged to have been stolen in Massachusetts was upheld upon proof that the goods were stolen in New York, and taken by a New York receiver into Massachusetts, and there sold to the indicted receiver,⁶—a decision the soundness of which cannot be said to be free from doubt.

It has even been held in Vermont that where goods stolen in a foreign country, as, for instance, Canada, are brought by

¹ *S. v. Haskell*, 33 Me. 127.

² 1 Hale, P. C. 507, 508; 2 Hale, P. C. 163.

³ *Rex v. Prowes*, 1 Moo. C. C. 349, C. 379; *Reg. v. Carr*, 15 Cox C. C. 131, note, C. 378.

⁴ *S. v. Underwood*, 49 Me. 181; *C. v. Cullins*, 1 Mass. 116; *C. v. Holder*, 9 Gray (Mass.), 7, C. 368.

⁵ *Stanley v. S.*, 24 O. St. 166, where the cases are collected.

⁶ *C. v. White*, 123 Mass. 430.

the thief into one of the States of this country, he may here be indicted for larceny.¹ This, however, is not the general rule.²

§ 81. **Statutory Jurisdiction of Crime.** — The question is sometimes raised how far a certain jurisdiction has power, by statutory enactment, to punish an act committed on the territory of another jurisdiction. An act which, though done outside a State, yet has a disturbing effect on the people of the State, may doubtless be punished by statute. Thus a State may by statute punish forgery outside the State of a deed to land within it.³ There is more doubt whether a State has power by statute to punish homicide when the fatal stroke was given in another jurisdiction, but the death occurred within the jurisdiction attempting to punish it. In Massachusetts such power has been held to exist;⁴ but in other States it has been denied.⁵

§ 82. **Jurisdiction of the United States Courts.** — Where lands within the territorial limits of a State are ceded to the United States, exclusive legislative and judicial authority is vested by the Constitution in the government of the United States; and they may exercise it, unless the State, by the act of cession, reserves rights inconsistent with the exercise of such authority.⁶

The United States have jurisdiction, also, over crimes of such a nature that they interfere with the due execution of the laws of the United States; for instance, over embezzlement of pension money,⁷ and fraudulent voting for members of Congress.⁸ They have jurisdiction also over crimes committed

¹ *S. v. Bartlett*, 11 Vt. 650, C. 376.

² *C. v. Uprichard*, 3 Gray (Mass.), 434. For a collection of later cases on the subject of this section see M. 714, note, and also *S. v. De Wolfe*, 29 Mont. 415, 74 P. 1084; *Beard v. S.* (Tex.), 78 S. W. 348.

³ *Hanks v. S.*, 13 Tex. App. 289.

⁴ *C. v. Macloon*, 101 Mass. 1.

⁵ *S. v. Kelly*, 76 Me. 331; *S. v. Carter*, 27 N. J. L. (3 Dutch.) 499, M. 585.

⁶ *Mitchell v. Tibbetts*, 17 Pick. (Mass.) 298; *Wills v. S.*, 3 Heisk. (Tenn.) 141; *U. S. v. Ward*, 1 Wool. C. Ct. 17, Fed. Cas. No. 16,639; *U. S. v. Tucker*, 122 Fed. 518.

⁷ *U. S. v. Hall*, 98 U. S. 343.

⁸ *In re Coy*, 127 U. S. 731.

against their officers in the course of their duty,¹ and have a certain power to protect from the criminal process of a State any officer who is indicted for an act done in the pursuance of his duty.²

§ 83. **Concurrent Jurisdiction.** — The same act — counterfeiting, for instance — may be an offence against two sovereignties, and punishable by both.³ So a bank officer, under the national bank law of the United States, may be punished by the United States for wilful misappropriation of the funds of the bank, and also, under the common law, for larceny, or for embezzlement, if the statute make it embezzlement, by the State in which the act is done.⁴ Doubtless, however, a prosecution in good faith by one government would be taken into consideration by the other.⁵

§ 84. **Extradition.** — In case of the flight of a criminal from the jurisdiction in which he committed the crime, he is not punishable where he is found, for he committed no crime against that sovereignty; yet the government which he offended cannot arrest and punish him. In the absence of compact between the two sovereignties he is therefore dispunishable. He has, however, no claim to impunity; he has gained no right of asylum, and justice will be furthered if some means are found of punishing him. This can be done only by mutual arrangement between the sovereignties, that is, by treaty. The process of obtaining the surrender of a fugitive from justice to the sovereignty whose laws he has broken is called extradition, and the treaty by which the surrender is guaranteed, an extradition treaty.

§ 85. **Foreign Extradition.**⁶ — The surrender of fugitives from justice to foreign governments, being a matter of foreign inter-

¹ *U. S. v. Logan*, 45 Fed. 872.

² *Tennessee v. Davis*, 100 U. S. 257; *In re Neagle*, 135 U. S. 1; *Re Fair*, 100 Fed. 149.

³ *Phillips v. P.*, 55 Ill. 429; *Fox v. Ohio*, 5 How. (U. S.) 410; *Moore v. Illinois*, 14 How. U. S. 13. So extortion: *Sexton v. California*, 189 U. S. 319; counterfeiting: *Martin v. S.*, 18 Tex. App. 224.

⁴ *C. v. Barry*, 116 Mass. 1.

⁵ *U. S. v. Amy*, 14 Md. 149.

⁶ See in general, on this subject, 17 Am. L. Rev. 315.

course, is by the Constitution of the United States committed to the Federal government exclusively; it is therefore unconstitutional for a State to surrender a fugitive to a foreign government under any circumstances.¹

An application for extradition under a treaty is made to the President of the United States, who thereupon issues a mandate, directed to a judge or commissioner of the United States, or to the judge of any court of record of any of the States. Under this mandate a complaint is made by the representative of the foreign government to any officer named in the mandate, and a warrant of arrest is thereupon issued, and the accused is brought before the court for examination.

This examination is not a trial, and sufficient evidence for conviction is not required. The accused may testify on his own behalf, and the evidence should be sufficient to justify a holding for trial according to the law of the forum.² The finding is certified to the Secretary of State, and thereupon the President issues his warrant of extradition. He has, however, discretion to refuse to issue the warrant.³ Extradition treaties are construed not to cover political offences, even though the act committed would otherwise be extraditable.⁴

Any error of law in the extradition proceedings may be reviewed and corrected by means of a writ of *habeas corpus*, which will lie even after the President has issued his warrant.⁵ The decision of the commissioner or court on the questions of fact involved cannot, however, generally be reversed. If any legal evidence was shown which would justify a holding for trial, the finding on questions of fact is final.⁶

An offender brought into a country by extradition proceedings can be tried only for the offence with which he was

¹ *U. S. v. Rauscher*, 119 U. S. 407.

² *In re Farez*, 7 Blatch. C. Ct. 345, Fed. Cas. No. 4,645; *Pettit v. Walshe*, 194 U. S. 205.

³ *In re Stupp*, 12 Blatch. C. Ct. 501, Fed. Cas. No. 13,563; *Spear on Extradition*, 1st ed. 214.

⁴ *Re Tivnan*, 5 Best. & S. 645.

⁵ *In re Farez*, 7 Blatch. C. Ct. 345, Fed. Cas. No. 4,645.

⁶ *In re Oteiza*, 136 U. S. 330; *Benson v. McMahon*, 127 U. S. 457.

charged, until a reasonable time has been given him to return to the country from which he was extradited.¹

Where one is forcibly abducted in a foreign country and brought into one of the States of the Union, and there tried, no Federal question is involved. The extradition treaties do not guarantee an asylum in the foreign country ; and the kidnapper therefore violated only the laws of the foreign country, not of the United States. Whether the State court will try an offender so brought within its jurisdiction is a question solely for the State to determine ; but the better view appears to favor the right of the State to prosecute,² and its jurisdiction is equally unaffected by irregularities in the procedure of the surrendering State.³

§ 86. **Interstate Extradition.** — The Constitution of the United States⁴ provides for the surrender by any State of fugitives from justice from another State. This makes the surrender of such fugitives the absolute duty of the State in which they have taken refuge ; a duty, however, which must be left to the moral sense of the Executive of such State, since there is no power in the Federal government to compel the Executive of a State to the performance of his official duty, nor to inflict punishment for the neglect of it.⁵ Extradition may be had under the Constitution for anything which is made criminal by the laws of the demanding State, though it was not a crime when the Constitution was formed, and is not a crime in the State of refuge.⁶

Since the judicial proceedings of one State are to have full faith and credit in every other,⁷ it is not necessary to institute judicial proceedings in the State of refuge ; the proceedings in the demanding State are enough. Accordingly, the process of interstate extradition is simpler than that of foreign

¹ *U. S. v. Rauscher*, 119 U. S. 407.

² *Ker v. Illinois*, 119 U. S. 436, 444.

³ *Kelley v. S.*, 13 Tex. App. 158.

⁴ Art. 4, § 2.

⁵ *Kentucky v. Dennison*, 24 How. (U. S.) 66.

⁶ *Ibid.*

⁷ Const. U. S., art. 4, § 1.

extradition. The procedure is established by act of Congress.¹ An application is made to the Governor of the State of refuge by the Governor of the demanding State, accompanied by a copy, certified by the Governor to be authentic, of an indictment found, or complaint made to a magistrate, in the demanding State. If satisfied that the accused is a fugitive from justice, the Governor of the State of refuge issues his warrant to the agent of the demanding State, who thereupon arrests and removes the fugitive.

The question of the guilt of the accused is not in issue. It is enough if he is legally charged with crime, according to the law of the demanding State.² Whether he is properly charged, the indictment duly certified, and the demand legally made, are questions of law, reviewable by the court on a writ of *habeas corpus*.³

The question whether the accused is a fugitive from justice is, however, a question of fact, to be decided by the Governor of the State of refuge. His decision, if reviewable, is so only if the evidence is utterly insufficient to justify a finding that the accused is a fugitive.⁴ To be a fugitive from justice, it is not necessary that the accused should have left a State to avoid prosecution; it is enough that, having committed a crime, he left that jurisdiction, and when sought for prosecution was found in another,⁵ even though when found he was in the State of his domicil.⁶ One is not however a fugitive from justice who did not leave the State in which he is found. Thus, where one commits a crime in another State by letter or by innocent agent, always remaining in the State of his domicil, he cannot be extradited.⁷

¹ Stat. 1793, c. 7, § 1; Rev. St. U. S., § 5278.

² *Kingsbury's Case*, 106 Mass. 223; *In re Clark*, 9 Wend. (N. Y.) 212; *Wilcox v. Nolze*, 34 O. St. 520.

³ *Robb v. Connolly*, 111 U. S. 624.

⁴ *Ex parte Reggel*, 114 U. S. 642; see *Eaton v. West Virginia*, 91 Fed. 760.

⁵ *Roberts v. Reilly*, 116 U. S. 80, 97; *Re Strauss*, 126 Fed. 327.

⁶ *Kingsbury's Case*, 106 Mass. 223.

⁷ *In re Mohr*, 73 Ala. 503; *Hartman v. Aveline*, 63 Ind. 344; *Jones v. Leonard*, 50 Ia. 106.

A warrant of extradition may be revoked by the Governor, or his successor, for any cause, even after the accused is in the hands of the agent of the demanding State.¹

There is much controversy upon the question whether an offender who has been extradited for one offence may be tried for another. The weight of authority seems to be that this is allowable, provided the extradition was procured in good faith, and the offence for which the trial is had is one for which the offender might have been extradited.² Many respectable authorities, however, hold that an offender can be tried only upon the indictment on which he was extradited, until he has had an opportunity to return to the State of refuge.³

¹ *Work v. Corrington*, 34 O. St. 64.

² *Waterman v. S.*, 116 Ind. 51, 18 N. E. 63; *Ham v. S.*, 4 Tex. App. 645; *Harland v. Terr.*, 3 Wash. Terr. 131, 13 P. 453; *S. v. Stewart*, 60 Wis. 587, 19 N. W. 429. Compare *Re Little*, 129 Mich. 454, 89 N. W. 38; *Mahon v. Justice*, 127 U. S. 700.

³ *S. v. Hall*, 40 Kan. 338, 19 P. 918; *In re Cannon*, 47 Mich. 481, 11 N. W. 280.

CHAPTER II.

OF CRIMINAL PROCEDURE.

§ 87. Process of a Criminal Prosecution.	§ 111. Joinder of Counts and Offences.
98. Criminal Pleading. — The Indictment.	117. Double Jeopardy.
	124. Evidence in Criminal Cases.

PROCESS OF A CRIMINAL PROSECUTION.

§ 87. **Arrest.** — The first step in a criminal suit is generally the arrest of the accused. This is ordinarily accomplished by means of a warrant, issued by a magistrate upon a complaint under oath. The warrant is thereupon executed by the proper official. In making the arrest, the officer may use all necessary force. He may after request break down the door even of a third party, upon reasonable belief that he will find the accused there;¹ especially if the accused has been lawfully arrested, and has escaped.²

The officer must be prepared to show his warrant on demand;³ though he need not show it, if the accused or the owner of the house into which he comes has seasonable notice that he is an officer acting under a warrant.⁴

§ 88. **Arrest without Warrant.** — Under certain circumstances an arrest may be made at once, without first obtaining a warrant. A private person is justified in making an arrest only if felony has been committed; but an officer may arrest upon reasonable suspicion of felony, or for a breach of the peace committed in his view. The power of an officer to break down doors, and to use all necessary force, would seem

¹ *C. v. Reynolds*, 120 Mass. 190; 2 Hale P. C. 117.

² *Cahill v. P.*, 106 Ill. 621; *C. v. McGahey*, 11 Gray (Mass.), 194.

³ *Codd v. Cabe*, 1 Ex. Div. 352.

⁴ *C. v. Irwin*, 1 All. (Mass.) 587.

to be equally great, if he is justified in making an arrest, whether he has or has not a warrant; but a private person can break down doors only while following a felon on fresh pursuit.¹

§ 89. **Commitment.** — After being arrested, whether with or without a warrant, the prisoner must be taken before the proper court or magistrate as soon as possible;² and meanwhile he is in the custody of the officer who arrested him. His personal property cannot be interfered with except that any article which might prove the crime, or which is described in the complaint as stolen, may be taken and preserved till the trial.³ But a watch or money belonging to the prisoner must be left in his possession.⁴

When the prisoner is brought before the court or magistrate, he is entitled to a speedy investigation of the charge against him. If the crime is one within the jurisdiction of the judge, an immediate trial may be had. If, however, the prisoner must be tried in a court of higher jurisdiction, evidence is introduced only for the purpose of proving a *prima facie* case; and if that is found, the prisoner is committed to await further proceedings.

The commitment is either to jail or to bail. Every prisoner must at common law be allowed bail upon a commitment, unless he is charged with a capital crime.⁵

§ 90. **Accusation.** — The formal accusation of the accused may be made in three ways: by indictment, by information, or by complaint. A complaint is an accusation by a private person, under oath, and is generally allowed only in case of small misdemeanors. An information is an accusation by the Attorney General under his own oath. This is not a common form of procedure, except in a few States of the Union. The common form of accusation is by indictment, which is found by the grand jury upon its oath.

¹ 4 Bl. Com. 292.

² *Tubbs v. Tukey*, 3 Cush. (Mass.) 438.

³ *Rex v. Burgiss*, 7 C. & P. 488; *Houghton v. Bachman*, 47 Barb. (N. Y.) 388.

⁴ *Rex v. Kinsey*, 7 C. & P. 447; *Rex v. O'Donnell*, 7 C. & P. 138.

⁵ 4 Bl. Com. 296.

An indictment may be found against one who has already been arrested and committed, or against one who is still at large; in the latter case, a warrant for arrest issues at once on the indictment being found, and is served in the same way as a warrant issued on complaint under oath.

§ 91. **Grand Jury.** — The grand jury is a jury of at least twelve men, and of no more than twenty-three; a majority of the jury, and at least twelve jurors, must join in finding a true bill.¹

Upon assembling, the jury is charged by the court, and then retires for consultation. No one may be present at its deliberations except the witnesses, and, in this country, the public prosecuting attorney.² The jury chooses a foreman, and then proceeds to consider the matters that may come before it.

The grand jury can act only upon certain lines. Its chief duty is to consider and pass upon the bills, that is, the formal written charges of crime, prepared by the prosecuting attorney. Such bills being presented to it, the evidence in support of the prosecution is heard. It is the duty of the prosecuting attorney to see that none but legal evidence is allowed to go to the grand jury. He may open the case, but must take no part in the discussion, and express no opinion. If twelve jurors find that there is reasonable cause for believing the charge stated in a bill to be a true one, the words "true bill" are indorsed upon it, and certified by the foreman; and at the end of the jury's sitting the foreman hands all "true bills" to the clerk. Bills so indorsed and presented to the court are called indictments. As an indictment cannot be found originally except by the grand jury, so it can be amended only by that body.

Besides the bills prepared by the prosecuting attorney for the consideration of the grand jury, it may inquire into certain other matters; namely, matters called to its attention by the court, or such public offences as come to light while it is considering other matters, or as may have come to the knowledge

¹ *Clyncard's Case*, Cro. Eliz. 654.

² *McCullough v. C.*, 67 Pa. 30.

of individual jurors.¹ If upon inquiry these matters seem to require prosecution, the grand jury states them in the form of a presentment, and it is thereupon the duty of the prosecuting attorney to frame an indictment for the crime thus presented.

§ 92. **Arraignment and Pleading.**—An indictment having been found, the prisoner must be set at the bar of the court; it is then read to him, and he is required to answer to it. This is called the arraignment. Except in the case of small misdemeanors, where the punishment is only by fine, the prisoner must be personally at the bar to plead.

If the prisoner would not plead, but stood mute, it was formerly necessary to empanel a jury and find whether the prisoner stood mute by visitation of God,² and if not, to compel the prisoner to plead by the use of force,³ at least in case of felony. Now, however, the plea of not guilty is everywhere entered, by statute, in such a case.

§ 93. **Trial and Verdict.**—If the prisoner pleads not guilty, an issue is joined, and must be tried by a jury. The prisoner must be present during the trial; a privilege, however, which he may waive, except in capital cases. If there is no such waiver, the jury must be empanelled, and the evidence, charge, and verdict must be given, in the presence of the prisoner. Motions may, however, be made and argued by counsel in his absence. If the prisoner pleads guilty, or *nolo contendere*, no issue is joined, and there is therefore no trial; and sentence may be at once imposed.

The prisoner may be convicted not merely of the offence with which he is charged, but of any lesser offence that can be carved out of his indictment. At common law, however, he cannot, on an indictment for felony, be convicted of a misdemeanor; but this has been generally changed by statute.

§ 94. **Nolle Prosequi and Quashing.**—The prosecuting attorney may, in his discretion, put an end to the prosecution of an indictment by entering a *nolle prosequi*. This can be done in some States only by consent of the court.

¹ McCullough v. C., 67 Pa. 30.

² S. v. Doherty, 2 Overton (Tenn.), 80.

³ 1 Steph. Hist. Cr. Law, 297.

If the indictment is defective, it may be quashed on motion of either party, or by the court on its own motion. An indictment may be quashed at any stage of the prosecution if it is apparent on the face of it that no judgment upon it could be supported. For certain formal defects, however, an indictment can be quashed only before plea.

§ 95. **Benefit of Clergy** was an old common law right which the clergy had, when they were charged with crime, of having their causes transferred to the ecclesiastical tribunals, or, after conviction, of pleading certain statutes in mitigation of sentence. Of its specific character and its limitations it is not proposed to speak, as it is doubtful if it is a right which can now be successfully asserted in any State of the Union.¹

§ 96. **Sentence.**—The only remaining step in a criminal prosecution is the judgment and sentence of the court. The defendant should be sentenced in presence of the court; but this is a privilege he may ordinarily waive. In case of capital crimes, however, the prisoner must be present, in order that he may state any reason why sentence should not be passed upon him. This is a matter of great importance to the State itself, which is interested in preserving the lives of its citizens; and the prisoner is therefore not allowed to waive the privilege.

§ 97. **Pardon.**—The executive branch of the government has power to pardon an offence,—a power which is defined and regulated in most of our constitutions. In the absence of constitutional limitation, a pardon may be granted at any time after an offence has been committed, whether or not prosecution has begun. The effect of a pardon is to remove all the consequences of a crime, not merely to remit the sentence.²

A pardon may be conditional; as that the offender will permanently leave the country, or will submit to a lesser punishment. In this case, if the offender breaks the condition, the original sentence may be enforced.³ This may be done

¹ See, for these particulars, 1 Bish. Cr. Law, § 38, and the authorities by him cited.

² 4 Bl. Com. 401.

³ 1 Bish. Crim. Law, 7th ed. § 914.

by immediate arrest and return to prison ;¹ though in Michigan it is held that one accused of violating the condition of his pardon is entitled to a trial.²

A temporary stay of execution of the sentence is called a reprieve.³

CRIMINAL PLEADING. — THE INDICTMENT.

§ 98. **Requisites of Indictment.** — The indictment is the formal charge upon which the entire suit is based ; and it must set forth the crime of which the defendant is accused fully, plainly, substantially, and formally.⁴ It should contain a description of the facts which constitute the crime, without ambiguity or inconsistency ; and except where, as in indictments for felony, certain formal words, such as *feloniously*, *burglariously*, *with malice aforethought*, etc., must be used,⁵ the language may be such as is ordinarily used and understood ; so long as the meaning is clear and unambiguous, the language is immaterial.⁶

Since judgment must be given on the indictment, this must state facts which are incompatible with the innocence of the accused. If it is capable of a meaning which would not necessarily import a crime it is insufficient,⁷ and may be attacked on this ground by demurrer.

Two and sometimes three sets of allegations are necessary to complete a charge of crime. It must first be shown what right the prosecuting government has to complain ; that is, an obligation toward the government must be shown to have been infringed. For this purpose, it is ordinarily enough to show that the act was committed within the jurisdiction of the government prosecuting. If the crime is one against the property of an individual, the existence of this individual

¹ *S. v. Barnes*, 32 S. C. 14, 10 S. E. 611.

² *P. v. Moore*, 62 Mich. 496, 29 N. W. 80.

³ 4 Bl. Com. 394.

⁴ Mass. Bill of Rights, art. 12 ; *C. v. Davis*, 11 Pick. (Mass.) 432.

⁵ 2 Hawk. P. C., c. 25, § 55.

⁶ *King v. Stevens*, 5 East, 244, 259.

⁷ *C. v. Grey*, 2 Gray (Mass.), 501.

right must also be alleged in addition to the public right. The right or rights having thus been set up, an infringement by the accused must finally be charged.

Where an indictment is made up of two or more distinct charges of crime, each charge is called a count of the indictment. Every count must in itself, without reference to the others, be sufficient as an indictment.

§ 99. **Elements of Crime.** — The indictment must contain all the elements of the crime charged. Thus, where a specific intent is one element of a crime, this intent must be alleged in the indictment.¹ So where the punishment is greater for a second offence, a former conviction must be alleged in the indictment in order to justify the infliction of the greater punishment.²

§ 100. **Particularity.** — The particularity which is necessary in framing an indictment is governed by the rights of the accused. Any one accused of crime has a right to be informed of the charge against him, so as to prepare for his defence. He has a right also to have the record so full that he may avail himself of the proceedings if he is again prosecuted for the same acts. There are therefore two tests of the particularity of an indictment: first, does it furnish sufficient information and particulars to enable the accused properly to prepare his defence; secondly, is it sufficiently precise to protect him from a second prosecution.³

§ 101. **Surplusage.** — Where allegations are made in the indictment which are unnecessary to the offence charged, they may be treated as surplusage; and so long as the offence is sufficiently described without them, they may be neglected, and a failure to prove them will not prevent a conviction.

It is very different, however, when a *material* allegation is made unnecessarily precise,⁴ as when a horse is described as white, or a person is alleged to be a resident of a certain place.

¹ *C. v. Shaw*, 7 Met. (Mass.) 52.

² *C. v. Harrington*, 130 Mass. 35; *Larney v. Cleveland*, 34 O. St. 599.

³ *C. v. Ramsey*, 1 Brewst. (Pa.) 422; *Fink v. Milwaukee*, 17 Wis. 26.

⁴ *Shearm v. Burnard*, 10 A. & E. 593, 596.

For in preparing his defence the accused, knowing that the allegation must be proved, would prepare to meet it as it was made, and, if he could prove it untrue, would be justified in resting his case. Therefore, where an indictment alleges that the accused suborned J. S. of W. to commit perjury, it is not proved by showing that he suborned J. S. of X.; though the indictment would have been sufficient if it had not alleged the residence of J. S.¹ So where the indictment describes the special marks on timber alleged to have been stolen, these marks must be proved;² and where a burial-ground alleged to have been desecrated is described in the indictment by metes and bounds, the description must be proved.³ And in like manner, where a woman is unnecessarily described as a widow, she must be proved to be a widow.⁴

§ 102. **Jurisdiction and Venue.** — As has been seen, facts must be stated which show the right of the court to try and punish; that is, there must be an allegation of jurisdiction on the part of the sovereignty prosecuting. This is ordinarily done by alleging that the act was against the peace of that sovereignty. If, however, one sovereignty succeeds another, — as happened for instance where the State of Maine was separated from Massachusetts, — an act committed before the change, but prosecuted after it, must be alleged to have been against the peace of the former government.⁵

Not only must there be an allegation of jurisdiction on the part of the State; jurisdiction over the crime must also be shown on the part of the court in which the indictment is found. This is done by laying the venue of the crime within the county or other district over which the court has jurisdiction. It is generally provided that a crime committed within a certain distance of the boundary of two counties may be tried in either county. In such a case, in order to show jurisdiction on the record, the act must be alleged

¹ *C. v. Stone*, 152 Mass. 498, 25 N. E. 967.

² *S. v. Noble*, 15 Me. 476.

³ *C. v. Wellington*, 7 All. (Mass.) 299.

⁴ *Rex v. Deeley*, 1 Moo. C. C. 303.

⁵ *Damon's Case*, 6 Me. 148.

to have been committed in that county in which the court is sitting.¹

§ 103. **Names.** — The indictment must contain the name of the accused, and of any one whose person or property he is charged with having injured. These names must be absolutely correct; otherwise, if the accused were a second time prosecuted, he could not avail himself of the former judgment. Therefore the transposition of two Christian names,² or the omission of one,³ is a fatal misnomer.

Not every slight error in a name is however fatal. The important question is, whether it would be impossible to doubt the identity; and if the name as written sounds the same as the true name, or, in technical language, if the two are *idem sonantia*, the indictment is sufficient. Thus in an indictment for forging the name McNicole, a forgery of the name McNicoll may be shown.⁴ The question whether two names are *idem sonantia* is for the jury.⁵

If the name of the injured person is unknown to the grand jury, it may be so stated, and the indictment is sufficient; though if this is done, and it transpires that the name was known, the allegation is bad.⁶ There is more difficulty where the accused refuses to give his name. In such a case, he should be described in the indictment as a person whose name is unknown, but who was personally brought before the jurors by the keeper of the jail.⁷

If one is described by a name by which he is actually known, it is sufficient, though it is not his true name.⁸ If, however, a person is known by two names, the ordinary and safer course is for both to be alleged; as, John Jones, *alias* John Smith.

¹ C. v. Gillon, 2 All. (Mass.) 502.

² Reg. v. James, 2 Cox C. C. 227.

³ C. v. Perkins, 1 Pick. (Mass.) 388.

⁴ Reg. v. Wilson, 2 Cox C. C. 426.

⁵ C. v. Donovan, 13 All. (Mass.) 571.

⁶ C. v. Morse, 14 Mass. 217.

⁷ Rex v. —, Russ. & Ry. 489.

⁸ Rex v. Norton, Russ. & Ry. 510; C. v. Desmarteau, 16 Gray (Mass.), 1, 17.

A variance in the name of a person other than the defendant is fatal, and entitles the defendant to an acquittal on the indictment. A variance in the name of the defendant is not, however, a fatal defect, since the fact tried is the guilt of the prisoner actually at the bar. In order to avail himself of such a defect, the defendant must plead the misnomer in abatement.¹

§ 104. **Time.** — It is necessary that the time of the offence should be alleged in the indictment; but it is not generally necessary to prove the time as laid. It is enough if some time is proved before the date of the indictment, and within the period set by the statute of limitations.² The time of a continuing offence may be charged on a certain day, and continuing from that day to the day of receiving the complaint.³

If however time is material, it must be accurately stated; for instance, where the crime is against a Sunday law,⁴ or where it is part of the description, as the date of a newspaper in which a libel was published.⁵ And so where the punishment of an offence is changed by statute, one cannot, on an indictment laying the offence before the new statute, be convicted of an offence after it.⁶ So the time laid must not be impossible or absurd; as, for instance, a time later than the complaint or indictment,⁷ or a time before the period of limitation.

§ 105. **Place.** — As has been seen, the place of the offence must be stated, in order to show the venue of the court. It is not, however, generally necessary to prove the place precisely as alleged; any place may be proved which is within the venue of the court.⁸

If however the place is material, as, for instance, in the case of burglary, the place must be alleged and proved with

¹ *Turns v. C.*, 6 Met. (Mass.) 224, 235.

² *P. v. Stocking*, 50 Barb. (N. Y.) 573.

³ *C. v. Frates*, 16 Gray (Mass.), 236.

⁴ *S. v. Caverly*, 51 N. H. 446.

⁵ *C. v. Varney*, 10 Cush. (Mass.) 402.

⁶ *C. v. Maloney*, 112 Mass. 283.

⁷ *C. v. Doyle*, 110 Mass. 103.

⁸ *C. v. Tolliver*, 8 Gray (Mass.), 386.

the greatest accuracy.¹ And so in every case where the act is local; such as maintaining a nuisance.² The place is also material when an act is a crime only when committed in a certain place, as within ten feet of the highway.

Every act alleged in the indictment must be laid at a certain time and place. When the acts were simultaneous, the ordinary method is to allege that they were done *then and there*. This form of words is not necessary; but such language must be used as will state some time with absolute certainty.³

§ 106. **Description.** — A sufficient description must be given of everything as to which a material allegation is made in the indictment. Thus, all property must be described as owned by some one, either the general or the special owner.⁴ The name ordinarily used to describe a thing is sufficient; but if it is ordinarily known by a specific name, it is not enough to describe it by the name of the material of which it is made. For instance, an ingot of tin or a bar of iron may be described as tin or iron, but cloth must be called cloth, not wool; and a coin or a cup must be so described, and not as such a weight of silver.⁵

§ 107. **Words.** — Whenever an offence consists of words written or spoken, these words must be stated in the indictment with exactness; any omission is a defect of substance.⁶ A mere literal variance, however, which does not affect the meaning, is not fatal: such, for instance, as the misspelling of a name, where the two forms are *idem sonantia*.

Where the words are obscene, it is held in this country that they need not be spread upon the records; it is enough to describe them in general terms, and explain the reason of omitting them.⁷ In England, however, this is not allowed.⁸

¹ *Rex. v. Napper*, 1 Moo. C. C. 44.

² *C. v. Heffron*, 102 Mass. 148.

³ *Arch. Crim. Plead*, 19th ed. 51.

⁴ *C. v. Morse*, 14 Mass. 217.

⁵ *Reg. v. Mansfield, Car. & M.* 140.

⁶ *Bradlaugh v. Reg.*, 3 Q. B. Div. 607, 616, 617.

⁷ *C. v. Holmes*, 17 Mass. 336.

⁸ *Bradlaugh v. Reg.*, 3 Q. B. Div. 616.

The rule applies to spoken as well as to written words, where they are the *gist* of the offence. But where words complained of are not the *gist* of the offence but only the means of committing it, as in the case of a prosecution for threats, they need not be set out with technical accuracy.¹

§ 108. **Contracts and Written Instruments.** — When it is material in the course of an indictment to allege the making or the existence of a contract, or of any written instrument, the writing or the contract must be set out exactly; and if it is an instrument that has a specific name, that name must be given to it, otherwise the indictment is repugnant, and fatally defective.²

§ 109. **Indictments upon Statutes.** — Where an indictment is brought for breach of a criminal statute, it must conclude with the allegation that the act was against the form of the statute (*contra formam statuti*) in that case made and provided.³ If the indictment states a common law crime, the allegation that it is *contra formam statuti* may be rejected as surplusage.⁴ It is therefore always safe to conclude with that allegation.

Where the enacting clause of a criminal statute describes the offence and makes certain exceptions, it is necessary in the indictment to negative the exceptions; but where exceptions are contained in a separate clause or proviso, they need not be mentioned in the indictment.⁵

It is not always sufficient for the indictment to follow the language of the statute. As has been seen, the statute must be interpreted with relation to the common law; and may omit certain elements of the crime which the common law supplies.⁶ Again, a certain specific intent is sometimes required in statutory crimes, though not mentioned in the

¹ *C. v. Murphy*, 12 All. (Mass.) 449; *C. v. Goodwin*, 122 Mass. 19, 33.

² *C. v. Lawless*, 101 Mass. 32.

³ *C. v. Springfield*, 7 Mass. 9.

⁴ *C. v. Reynolds*, 14 Gray (Mass.), 87.

⁵ *Beasley v. P.*, 89 Ill. 571; *C. v. Maxwell*, 2 Pick. (Mass.) 139; *Jefferson v. P.*, 101 N. Y. 19, 3 N. E. 797; *U. S. v. Cook*, 17 Wall. (U. S.) 168.

⁶ *U. S. v. Carll*, 105 U. S. 611.

statute. This intent must be alleged in the indictment. So where a statute forbade the removal of a human body from a grave, this was held to mean a removal for purposes of dissection, and that purpose must be alleged in the indictment;¹ and an indictment for keeping open shop on the Lord's day must allege that the shop was kept open for business.²

In many cases statutes have been framed with the evident purpose of extending to the realty that protection which the common criminal law extended to personalty. In these cases the indictment must show that the property alleged to have been interfered with was part of the realty. Thus, an indictment upon a statute forbidding the removal of gravel from land must allege that the gravel was part of the realty;³ and where the statute forbids the malicious destruction of glass in a building, the indictment must allege that the glass was part of the building.⁴

§ 110. **Statutory Forms of Indictment.** — The legislature often prescribes a shortened and simplified form of indictment; and such action is often salutary, especially in the case of indictments for felony, where much useless verbiage has become or has seemed to be necessary. But care must be used that in shortening the form of indictment no necessary allegations are omitted; for, at least under our Constitutions, an indictment, though authorized by statute, is bad if every necessary element of crime is not stated in it. Thus, a statutory form of indictment is unconstitutional if it omits the allegation of a specific intent,⁵ or if it charges the defendant with perjury before a certain court without alleging in what respect he swore falsely.⁶ So it is unconstitutional to provide that one may be more heavily punished for a second offence, though the former conviction is not alleged in the indictment.⁷

¹ *C. v. Slack*, 19 Pick. (Mass.) 304.

² *C. v. Collins*, 2 Cush. (Mass.) 556.

³ *Bates v. S.*, 31 Ind. 72.

⁴ *C. v. Bean*, 11 Cush. (Mass.) 414.

⁵ *S. v. Learned*, 47 Me. 426.

⁶ *S. v. Mace*, 76 Me. 64.

⁷ *C. v. Harrington*, 130 Mass. 35.

It is perfectly constitutional, however, to provide for a charge of crime by the use of its legal name, without a full description of it. So it is constitutional to indict one for committing perjury before a certain court by giving certain testimony, without alleging that the testimony was false; for perjury is necessarily false swearing.¹

JOINDER OF COUNTS AND OFFENCES.

§ 111. **Duplicity.**—Only one crime may be stated in a single count. If the elements of more than one crime are included in a count, it is uncertain which crime is charged, and the accused cannot prepare his defence.²

Where, however, one or more smaller crimes are merged in a greater crime when the latter is committed, the indictment for the greater crime is not double because it states such elements of the smaller crimes as also exist in the greater. So an indictment for homicide may and must include a charge of assault and of battery; and an indictment for burglary may contain a charge of larceny, and must include one of attempt to commit larceny.³

Whether duplicity is a defect of form or of substance is doubtful. The better opinion seems to be that it is a defect of form only, and therefore that it cannot be taken advantage of after verdict. In some jurisdictions, however, it is held that where the punishment for the two offences which are joined is different, duplicity is a fatal defect, even after verdict.⁴

§ 112. **Conviction of Lesser Offence.**—When the crime charged necessarily embraces a lesser offence as part and parcel of it, and the latter is described in the indictment with such distinctness that it would constitute a good separate indictment for that offence, the accused, under the indictment charging the greater and the lesser, may be found guilty of the latter.

¹ *S. v. Corson*, 59 Me. 137.

² *Rex v. Marshall*, 1 Moo. C. C. 158.

³ *C. v. Tuck*, 20 Pick. (Mass.) 356.

⁴ *Reed v. P.*, 1 Park. (N. Y.) 481; *P. v. Wright*, 9 Wend. (N. Y.) 193.

Thus, on an indictment for an assault with intent to murder, the assault being well charged, and the intent not being proved, the defendant may be found guilty of an assault. This was the common law when both offences were of the same grade, and is now the law by statute in England, and very generally in the United States, when the offences are of different grades.¹

§ 113. **Joinder of Counts for Same Offence.** — It is allowable for the pleader to state the same offence in different ways, in as many different counts to one indictment, even though the punishment is different, provided the counts are all for felony or all for misdemeanor.² At common law, two counts could not be joined in the same indictment where one was for a felony and the other for a misdemeanor; for the incidents of trial — as to challenges of jurors, for instance — were different in the two classes of crime. By statute, however, this has almost everywhere been done away with, and felony and misdemeanor may be joined.³

When a trial is had on an indictment containing several counts for the same offence, a general verdict of guilty is good; or the defendant may be found guilty on one count and not guilty on the rest. He may not, however, be found guilty on two counts, and not guilty on others; for such a verdict would be inconsistent, and would make two offences out of one.⁴

A misjoinder of counts is cured by a verdict for the defendant on the counts improperly joined.⁵ And where one of the counts is bad, a general verdict of guilty will stand, so long as there is a valid count to support it.⁶

§ 114. **Joinder of Offences.** — Two or more counts may be joined in the same indictment, even for different offences,

¹ *Reg. v. Bird*, 5 Cox C. C. 20; *C. v. Roby*, 12 Pick. (Mass.) 496; 1 Bish. Cr. Law, 7th ed., § 809.

² *Beasley v. P.*, 89 Ill. 571.

³ So in Pennsylvania by the common law: *Stevick v. C.*, 78 Pa. 460.

⁴ *C. v. Fitchburg R. R. Co.*, 120 Mass. 372.

⁵ *C. v. Chase*, 127 Mass. 7.

⁶ *Claasen v. U. S.*, 112 U. S. 110, and cases cited.

provided they are of the same general nature, and subject to the same sort of punishment; and, in the absence of statute, provided they are all felonies or all misdemeanors.¹ This liberty is liable to abuse; for where a great number of offences are joined in a single indictment, too great a burden is put on the defendant in preparing his defence. There exists no remedy for this abuse, however, except the discretion of the court to order the prosecution to elect on which count or counts it will proceed.² This is more often done in the case of felony than of misdemeanor. In fact, it seems to follow of course in England that the court, on request of the defendant, should compel an election in case of felony; but it is never a matter of course in a case of misdemeanor.³

§ 115. **Cumulative Sentence.** — Where an indictment charges different offences in different counts, the question of punishment is a difficult one. In England in such a case each count is held to be a separate charge of crime; and sentence is imposed upon each count, that on the second count to begin upon the termination of the sentence on the first count.⁴ In New York, however, a cumulative sentence, where the punishment of each crime was imprisonment, was held void.⁵ The argument on which this decision was based would seem to hold equally good where the punishments are all fines; yet every court would probably hold it proper to impose a separate fine on each count of an indictment. The English decision would seem to be supported by the most valid arguments.

§ 116. **Joinder of Defendants.** — Where two or more join in the commission of a crime, each may be separately indicted, or all may be joined in a single indictment; and in that case they may be tried together, and one found guilty while another is acquitted.⁶ The defendants, must, however, all be

¹ *C. v. Mullen*, 150 Mass. 394, 23 N. E. 51; *C. v. O'Connell*, 12 Allen (Mass.), 451.

² *C. v. Mullen*, *ante*.

³ *Castro v. Reg.* 6 App. Cas. 229, 244.

⁴ *Castro v. Reg.* 6 App. Cas. 229.

⁵ *P. v. Liscomb*, 60 N. Y. 559.

⁶ 2 Hawk. P. C., c. 25, § 89.

guilty of the same offence; therefore, all must be principals or all accessories.

It lies in the discretion of the court, where two defendants are jointly indicted, to try them separately; and a defendant cannot object to the exercise of this discretion, or the refusal to exercise it.¹

DOUBLE JEOPARDY.

§ 117. **No One Twice to Be Put in Jeopardy.** — It is a well-settled and most salutary principle of criminal law that no person shall be put upon trial twice for the same offence. This old doctrine of the common law has found its way into the Constitution of the United States, and into that of most or all of the States, in different forms of expression, substantially that no person shall be put twice in jeopardy of life or limb for the same offence. The meaning of this is, that when a person has been in due form of law put upon trial upon a good and sufficient indictment, and convicted or acquitted, that conviction or acquittal may be pleaded in bar to a subsequent prosecution, within the same jurisdiction, for the same offence.² And even if the indictment be insufficient and the proceedings be irregular, so that a judgment thereupon might be set aside upon proper process, yet if the sentence thereunder has been acquiesced in by and executed upon the convict, such illegal and voidable judgment constitutes a good plea in bar.³ So if the prisoner be sentenced to an illegal punishment — as, for instance, to fine and imprisonment, where the law authorizes only one — after part execution of either, he cannot afterwards, upon a revision of the sentence, even during the same term of court, be punished by the imposition of the lawful punishment.⁴

The trial and jeopardy begin when the accused has been arraigned and the jury empanelled and sworn.⁵

¹ 1 Bish. Crim. Proc., 3d ed. § 1018.

² *U. S. v. Gibert*, 2 Sumn. (U. S. C. Ct.) 19, Fed. Cas. No. 15, 204.

³ *C. v. Loud*, 3 Met. (Mass.) 328.

⁴ *Ex parte Lange*, 18 Wall. (U. S.) 163, Clifford and Strong, JJ., dissenting.

⁵ *Bryans v. S.*, 34 Ga. 323; *C. v. Tuck*, 20 Pick. (Mass.) 356; *Ferris v. P.*, 48 Barb. (N. Y.) 17.

Though from the words "jeopardy of life or limb" it has been contended that the rule is applicable, where such words or their equivalent are used, only to such crimes as are punished by injury to life or limb, yet it is very generally, if not universally, held by the courts that it is applicable to all grades of offences.¹ It is not only for the interest of society that there should be an end of controversy, but it is a special hardship that an individual should be indefinitely harrassed by repeated prosecutions for the same offence. Where, however, the same act constitutes two offences, there may be a punishment for each offence.² But if the same act is made an offence by two statutes, creating different offences in name but designed to prevent the same crime, the offender cannot be convicted under both statutes.³

§ 118. So firmly is this doctrine established, that the government will not be allowed to institute a second prosecution, or put the prisoner to a new trial, even though his acquittal is consequent upon the judge's mistake of law, or the jury's disregard of fact. If, however, he be convicted by a misdirection of the judge in point of law, or misconduct on the part of the jury, he may by proper process have the verdict set aside; in which case, the trial not having been completed, and the verdict having been set aside, at his request, the accused may be again set to the bar.⁴

To give the accused, therefore, a good plea that he has once been put in jeopardy, it must appear that he was put upon trial in a court of competent jurisdiction, upon an indictment upon which he might have been lawfully convicted of the crime charged, and before a jury duly empanelled, and that, without fault on his part, he was convicted or acquitted, or that, if there was no verdict, the jury were unlawfully discharged. And the jury may be discharged before verdict is

¹ 1 Bish. Cr. Law, § 990.

² *S. v. Inness*, 53 Me. 536; *C. v. McShane*, 110 Mass. 502.

³ *Wemyss v. Hopkins*, L. R. 10 Q. B. 378.

⁴ *Reg. v. Drury*, 3 Car. & K. 193; *Reg. v. Deane*, 5 Cox C. C. 501; *C. v. Green*, 17 Mass. 515; *C. v. Sholes*, 13 All. (Mass.) 554; *P. v. McKay*, 18 Johns. (N. Y.) 212.

rendered when, in the judgment of the court, there is a clear necessity therefor, or the ends of justice will otherwise be defeated; as where the term of court expires before a verdict is reached; or the jury, after sufficient deliberation, of which the court is the judge, cannot agree; or the trial is interrupted by the sickness or death of judge or juror; or the jury is discharged by the consent of the prisoner.¹ So much of the learned opinion of Judge Story, in *United States v. Gibert*,² as holds that no new trial can be had in cases of felony, is now generally, if not universally, regarded as unsound law.³ If the accused procure a conviction by fraud, it will not avail him as a plea in bar, this being, within the above rule, by his fault.⁴ So if, after a trial, the prisoner fails to appear when the jury return with their verdict, and no verdict is rendered, no trial is completed, and the accused may be put on trial again. And if the court before whom the accused was formerly tried had no jurisdiction, there has been no jeopardy.⁵

§ 119. **Prosecution by Another Sovereignty.** — The rule does not protect from prosecution by another sovereignty, if the same act is a violation of its law, as the laws of a country, and especially the criminal laws, have no extra-territorial efficacy. If, therefore, one sovereignty has punished an act which was also a violation of the law of another sovereignty, the latter has the right, in its discretion, also to punish the act.⁶ Doubtless, however, in such case, the fact of prior punishment would have great weight in determining whether the guilty party should be again punished at all, or if punished, to what

¹ See *Reg. v. Bird*, 5 Cox C. C. 20; *McNeil v. S.*, 47 Ala. 498; *S. v. Wilson*, 50 Ind. 487; *S. v. Vaughan*, 29 Iowa, 286; *C. v. Roby*, 12 Pick. (Mass.) 496; *Guenther v. P.*, 24 N. Y. 100; *S. v. Jefferson*, 66 N. C. 309; *Hines v. S.*, 24 O. St. 134; *Ex parte Lange*, 18 Wall. (U. S.) 163; *Simmons v. U. S.*, 142 U. S. 148.

² 2 Sumner C. Ct. 19, Fed. Cas. No. 15,204.

³ *Ex parte Lange*, *ante*, dissenting opinion of Clifford, J.

⁴ *S. v. Battle*, 7 Ala. 259; *C. v. Alderman*, 4 Mass. 477; *C. v. Dascom*, 111 Mass. 404; *S. v. Cole*, 48 Mo. 70; *S. v. Lowry*, 1 Swan (Tenn.), 34.

⁵ *Reg. v. Bowman*, 6 C. & P. 337; *C. v. Peters*, 12 Met. (Mass.) 387; *P. v. Barrett*, 1 Johns. (N. Y.) 66.

⁶ *Phillips v. P.*, 55 Ill. 429; *U. S. v. Amy*, 14 Md. 149, n.; *C. v. Green*, 17 Mass. 515; *S. v. Brown*, 1 Hayw. (N. C.) 100; *ante*, § 83.

degree.¹ It has been said by high authority,² that a conviction under one sovereignty of piracy, which is an offence against all sovereignties, would doubtless be recognized in all other civilized countries as a good plea in bar to a second prosecution. When there are two sovereignties having jurisdiction within the same geographical limits, there can be no doubt that one act may constitute a crime against both, and be punishable by both. Thus, an assault upon an officer of the United States, while acting in the discharge of his duty within the limits of a State, may be punished by the State as an assault, and by the United States as an assault upon its officer in the discharge of his duty, — a higher offence.³ So it has been held that the same act may be a violation of a city charter and the penal law of the State.⁴ But the better view seems to be that in such a case there is only one offence, and can be but one punishment.⁵

§ 120. **What Is the Same Offence.** — Where there has been an acquittal for variance, a new indictment will lie, in which the crime is correctly described. The two offences are not identical.⁶ So where formerly the venue was wrongly stated;⁷ or the property alleged to have been injured was wrongly described;⁸ or a murder was alleged to have been committed by shooting, where the evidence showed it was done by beating;⁹ The same is true where the act is described as a different crime, having been wrongly described before; as where one acquitted of larceny is indicted for receiving stolen goods,¹⁰ or one acquitted of a crime as principal is indicted as accessory.¹¹ The test is this: whether, if what is set out in the second in-

¹ *U. S. v. Amy*, *ante*.

² *U. S. v. Pirates*, 5 Wheat. (U. S.) 184.

³ *Moore v. Illinois*, 14 How. (U. S.) 13.

⁴ *Ambrose v. S.*, 6 Ind. 351.

⁵ *Preston v. P.*, 45 Mich. 486, 8 N. W. 96; *S. v. Thornton*, 37 Mo. 360.

⁶ *C. v. Chesley*, 107 Mass. 223.

⁷ *C. v. Call*, 21 Pick. (Mass.) 509.

⁸ *C. v. Wade*, 17 Pick. (Mass.) 395.

⁹ *Guedel v. P.*, 43 Ill. 226.

¹⁰ *C. v. Tenney*, 97 Mass. 50.

¹¹ *Rex v. Plant*, 7 C. & P. 575; *Reynolds v. P.*, 83 Ill. 479.

dietment had been proved under the first, there could have been a conviction.¹

§ 121. **Prior Conviction of Less Degree of Same Offence.** — Where one is tried on an indictment consisting of several counts, and is acquitted on some counts and convicted on others, and secures a new trial, he cannot again be tried on those counts on which he has been acquitted.² Where he is found guilty of a less degree of crime than that charged, as when on an indictment for murder he is found guilty of manslaughter, and secures a new trial, he cannot, according to the weight of authority, be again convicted of a higher crime than that of which he was formerly convicted; for conviction of the lower crime involves an acquittal of the higher.³

§ 122. **Greater or Less Offence.** — As to the effect of a former acquittal of an offence which includes, or is part of, another offence, there is some confusion, not to say difference, amongst the authorities. But the following is believed to be a fair statement of the result. Where a person has been tried for an offence which necessarily includes one or more others of which he might have been convicted under the indictment, he cannot be afterwards tried for either of the offences of which he might have been convicted under the indictment on which he was tried.⁴ Thus, if the trial is upon an indictment for assault and battery, it cannot be afterwards had upon an indictment for an assault. On an indictment for an offence which is part and parcel of a greater, a previous trial for the lesser is not a bar to a subsequent trial for the greater, unless some decisive fact is necessarily passed upon under the first indictment, in such a way as to amount to an effectual bar to the second.⁵ A conviction or acquittal, in order to be a bar to a

¹ 2 East P. C. 522; 1 Bish. Crim. Law, 7th ed., § 1052; *Rex v. Taylor*, 3 B. & C. 502; *U. S. v. Nickerson*, 17 How. (U. S.) 204.

² *S. v. Kattlemann*, 35 Mo. 105.

³ *Slaughter v. S.*, 6 Humph. (Tenn.) 410; *S. v. Belden*, 33 Wis. 120; *contra, S. v. Behimer*, 20 O. St. 572. See the authorities collected, Wharton, Crim. Plead., 9th ed., § 465.

⁴ *Reg. v. Gould*, 9 C. & P. 364; *P. v. M'Gowan*, 17 Wend. (N. Y.) 386.

⁵ *Reg. v. Bird*, 5 Cox C. C. 20.

subsequent prosecution in such a case, must be for the same offence, or for an offence of a higher degree, and necessarily including the offence for which the accused stands a second time indicted. Thus, a conviction under an indictment for assault is no bar to an indictment for assault with intent to rob, because the prisoner has never been tried on an indictment which involves an issue conclusive upon the second charge. On the other hand, if one be acquitted on an indictment for manslaughter, he cannot afterwards be tried for murder, because the acquittal necessarily involves the finding the issue of killing, whether with or without malice, in favor of the defendant.¹ And this would be true, even if the judge should discharge the jury on the ground that the proof made the case one of murder.² And the same is true where the prisoner was formerly tried for a less serious degree of larceny or of house-burning than that now charged.³ The offence is the same if the defendant might have been convicted on the first indictment by proof of the facts alleged in the second. The question is not whether the same facts are offered in proof to sustain the second indictment as were given in evidence at the trial of the first, but whether the facts are so combined and charged in the two indictments as to constitute the same offence. It is not sufficient that the facts on which the two indictments are based are the same. They must be so alleged in both as to constitute the same offence in degree and kind.⁴

A conviction or acquittal on a charge of larceny of one of several articles, all stolen at the same time, is a good plea in

¹ *S. v. Foster*, 33 Ia. 525; *Scot v. U. S.*, *Morris*, 142.

² *P. v. Hunkeller*, 48 Cal. 331. See also upon the general subject, as involving the different views of different courts, *Wilson v. S.*, 24 Conn. 57; *Roberts v. S.*, 14 Ga. 8; *S. v. Inness*, 53 Me. 536; *C. v. Hardiman*, 9 Allen (Mass.), 487; *S. v. Pitts*, 57 Mo. 85; *S. v. Cooper*, 1 Green (N. J.) 361; *S. v. Nutt*, 28 Vt. 598; and 1 Bish. Cr. Law, c. 63, where the whole subject is treated with great fulness.

³ *C. v. Squire*, 1 Met. (Mass.) 258.

⁴ *Rex v. Vandercomb*, 2 Leach (4th ed.) 708; *Durham v. P.*, 4 Scam. (Ill.) 172; *C. v. Clair*, 7 Allen (Mass.) 525; *P. v. Warren*, 1 Park. (N. Y.) C. R. 338.

bar of any subsequent prosecution for the larceny of either or all of the other articles.¹

An exception, however, exists in the case of murder. Where the prisoner was formerly tried for an assault, and convicted, if the party assaulted afterwards dies from the assault, the prisoner may be tried for the murder, and his former jeopardy will not avail him.² And an acquittal of an assault with intent to kill the party who afterwards dies from the assault will not necessarily protect the accused, since murder may be committed without any intent to kill, and even without a criminal assault.³

§ 123. **Practice.** — If a plea of former acquittal or conviction to an indictment for a misdemeanor be found, on replication or demurrer, against the prisoner, he might be sentenced without a trial for the offence itself; ⁴ but upon the decision against the prisoner in such a case, on an indictment for felony, he might answer over, and have his trial upon the merits. This is not, however, the rule in this country, where the prisoner is usually allowed to have his trial in both cases, as a matter of right, if in his plea he reserves the right to plead over.⁵ In Tennessee, it has been said to be a matter of discretion with the court.⁶

EVIDENCE IN CRIMINAL CASES.

§ 124. **Burden of Proof.** — The rules of evidence applicable in criminal cases are substantially the same as in civil cases, with the single exception that in a criminal case every essential allegation made by the prosecution must be proved beyond a reasonable doubt, in order to entitle the government to a ver-

¹ *Jackson v. S.*, 14 Ind. 327. See also *Fisher v. C.*, 1 Bush (Ky.) 211; *Guenther v. P.*, 24 N. Y. 100.

² *Reg. v. Morris*, 10 Cox C. C. 480; *S. v. Littlefield*, 70 Me. 452; *C. v. Roby*, 12 Pick. (Mass.) 496.

³ *Reg. v. Salvi*, 10 Cox C. C. 481, n.

⁴ *Reg. v. Bird*, 2 Eng. L. & Eq. 530, 5 Cox C. C. 20.

⁵ *S. v. Dresser*, 54 Me. 569; *C. v. Goddard*, 13 Mass. 455; *Ross v. S.*, 9 Mo. 696; *Barge v. C.*, 3 P. & W. (Pa.) 262; *U. S. v. Conant*, C. Ct. Mass., Fed. Cas. No. 14,843.

⁶ *Bennett v. S.*, 2 Yerg. (Tenn.) 472.

dict. If upon all the evidence introduced by the government and by the accused there results a reasonable doubt upon any essential allegation in the indictment or complaint, the criminal is entitled to an acquittal. Upon all these issues, therefore, he has only to raise a reasonable doubt. When, however, the accused sets up in defence a distinct and independent fact, not entering into these issues, he must prove it by a preponderance of evidence. Thus, if the defence be insanity, the better view is, that, since it is a part of the case of the prosecution that the accused was sane, it is necessary for the accused to produce, or that there should appear in the case upon all the evidence introduced, only so much evidence of insanity as to induce a reasonable doubt on the issue, in order to secure his acquittal.¹ If, on the other hand, the defence be a former acquittal, since this is a new, distinct, and independent fact, in no way embraced in the allegations of the prosecution, the accused assumes the burden of proof, and must establish the fact by a preponderance of evidence. In civil cases, each party takes the burden of proof of the facts alleged essential to make out his case, and may establish them by a preponderance of proof.² Criminal cases to which the rule of proof beyond reasonable doubt applies are such only as are criminal in form, and cognizable by a court administering the criminal law. If the question whether a crime has been committed arises in a civil case, tried by a court administering the civil, as *contra-distinguished* from the criminal law, the rule of evidence applicable in the civil courts prevails. Thus, in an indictment for an assault, the prosecution must prove the assault beyond a reasonable doubt; while, in a civil action for damages for the same assault, the plaintiff is only required to prove it by a preponderance of evidence.

The general test of a criminal case is that it is by indictment, and of a civil case that it is by action. But the decisions upon this point are not uniform.³

¹ *Ante*, § 45.

² See 1 Greenl. Ev. (13th ed.), §§ 81 *a*, 81 *b*; 2 Greenl. Ev., § 29, n.; Steph. Dig. of the Law of Ev. (May's ed.), p. 40, n.; 10 Am. L. Rev., pp. 642 et seq.; *Kane v. Hibernia Ins. Co.*, 10 Vroom (N. J.) 697.

³ The cases are very fully collected in 1 Bish. Cr. Law, §§ 32, 33.

§ 125. **Doubt as to Interpretation.** — If it be fairly doubtful whether the crime charged comes within the purview of a statute, it has been frequently said, the prisoner is entitled to the benefit of the doubt.¹ But it has also been held that it is not the duty of the court to instruct the jury that, if they have a reasonable doubt as to the law or the applicability of the evidence, they must give the prisoner the benefit of the doubt.² And perhaps it is only a court of last resort, if any, which should give the prisoner that benefit.³

It is, however, a universal rule of construction, that all penal and criminal laws shall be construed strictly in favor of the life, liberty, and property of the citizen.⁴

§ 126. **Corpus Delicti.** — There must be clear proof of the *corpus delicti*, that is, of the fact that a crime has been committed.⁵ Were this not required, the danger of conviction in cases where no crime had in fact been committed would be great. But this fact, like any other, may be proved, by a proper amount of circumstantial evidence;⁶ it must, however, be so proved beyond reasonable doubt.⁷

§ 127. **Testimony of Defendant.** — At common law the defendant was not allowed to testify in his own behalf. This has been changed in this country by statute, and a defendant may if he chooses testify on his own behalf. By all our Constitutions, however, a witness cannot be compelled to testify against himself; consequently the prosecution cannot call upon the defendant to take the stand.

It is provided in some States that, if the accused does not testify, no inference can be drawn against him. Even where

¹ U. S. v. Whittier, Dillon, J. 6 Repr. 260, Fed. Cas. No. 16,688, and cases there cited.

² O'Neil v. S., 48 Ga. 66.

³ Cook v. S., 11 Ga. 53.

⁴ C. v. Barlow, 4 Mass. 439.

⁵ 2 Hale P. C. 290; Best, Evid. (Chamberlayne's ed.), § 441; Rex v. Burdett, 4 B. & Ald. 95, 123, 162; P. v. Palmer, 109 N. Y. 110, 16 N. E. 529; Willard v. S., 27 Tex. App. 386; S. v. Davidson, 30 Vt. 377.

⁶ Stocking v. S., 7 Ind. 326; S. v. Cardelli, 19 Nev. 319, 10 P. 433; U. S. v. Williams, 1 Cliff C. C. 5, Fed. Cas. No. 16,707.

⁷ Lee v. S., 76 Ga. 498; Gray v. C., 101 Pa. 380.

this provision is not made, it would seem unfair to draw such an inference, especially in view of the constitutional provision.¹ It has however been held in such a case that the refusal of the accused to testify may be used against him.²

If the accused goes on the stand, the better view is that he has waived his constitutional privilege, and may be compelled to answer any questions pertinent to the issue,³ though not questions which are asked merely to affect the credibility of the witness.⁴ Some authorities, however, hold that a defendant who has become a witness can claim his privilege at any time, though if he does so unfavorable inferences may be drawn.⁵

If the evidence of the defendant is weak and unsatisfactory, the same inferences may be drawn as in the case of any witness.⁶

§ 128. **Confessions.**—The genius of the common law looks with disfavor upon any attempt to prove one guilty of crime by his own testimony; and even a confession of guilt by the accused is received in evidence only under certain conditions. The confession must be entirely voluntary. If it was made under duress, or by reason of a threat or promise of favor by one in authority, it is not admissible.⁷ Such confessions are not rejected because of the breach of faith, but because a confession gained by such means is untrustworthy.⁸ It must appear, therefore, that the confession was induced by the threat or promise, and, it would seem, that the circumstances were such that the accused would be likely to tell an untruth from fear or hope induced by those in authority.⁹

¹ *P. v. Tyler*, 36 Cal. 522.

² *S. v. Bartlett*, 55 Me. 200.

³ *C. v. Nichols*, 114 Mass. 285; *C. v. Tolliver*, 119 Mass. 312; *Connors v. P.*, 50 N. Y. 240.

⁴ *P. v. Brown*, 72 N. Y. 571.

⁵ *Cooley*, Const. Limit., *317.

⁶ *Stover v. P.*, 56 N. Y. 315.

⁷ *Warickshall's Case*, 1 Leach C. C. 263.

⁸ *Reg. v. Baldry*, 2 Den. C. C. 430; *C. v. Knapp*, 9 Pick. (Mass.) 495.

⁹ *Reg. v. Jarvis*, L. R. 1 C. C. 96; *Reg. v. Reeve*, L. R. 1 C. C. 362; *C. v. Cuffee*, 108 Mass. 285.

It seems to be doubtful whether court or jury is to decide on the question of threat or promise. As a question involving the admissibility of evidence, it would seem more properly to be a question for the court;¹ but it is often held that the question should be left to the jury.²

If the confession was in fact voluntarily made, it is admissible, though given without any reference to the present proceedings, and even under a misapprehension. Thus, testimony voluntarily given at a fire inquest,³ or at a former trial,⁴ is admissible; and so is a confession made to officers who had arrested the accused illegally.⁵ And this is true, although the confession was made without knowledge of the constitutional rights of an accused, and without advice of counsel.⁶

If one receives a confession while pretending to be an officer, but in fact is not in authority, the better view would seem to be that the confession is admissible. So if a man's confession is overheard, or is obtained by a private person by cheat or drunkenness, it may be used.⁷ And if in consequence of an inadmissible confession other evidence is discovered, as, for instance, if the weapon with which a murder was committed is found, such evidence may be introduced.⁸

The rule as to confessions does not apply to admissions from conduct. Evidence of the conduct of the accused is always receivable; such, for instance, as the flight of the defendant,⁹ or silence of the accused when damaging statements are made under such circumstances as call for denial.¹⁰

An uncorroborated confession is not enough to justify a conviction. The *corpus delicti* or fact that a crime has been committed, must be at least plausibly shown by other evidence.¹¹

¹ *Biscoe v. S.*, 67 Md. 6, 8 Atl. 571; *Ellis v. S.*, 65 Miss. 44, 3 So. 188.

² *C. v. Piper*, 120 Mass. 185.

³ *C. v. Bradford*, 126 Mass. 42.

⁴ *C. v. Reynolds*, 122 Mass. 454.

⁵ *Balbo v. P.*, 80 N. Y. 484.

⁶ *S. v. Garrett*, 71 N. C. 85.

⁷ *C. v. Howe*, 9 Gray (Mass.) 110.

⁸ *C. v. James*, 99 Mass. 438; *S. v. Garrett*, 71 N. C. 85.

⁹ *P. v. Stanley*, 47 Cal. 113 (*semble*).

¹⁰ *Kelley v. P.*, 55 N. Y. 565.

¹¹ *Matthews v. S.*, 55 Ala. 187; *S. v. German*, 54 Mo. 526, 14 Amer.

§ 129. **Evidence of Character.**—The character of the accused cannot be shown in evidence by the prosecution;¹ but the defendant may introduce evidence of his own good character, which then may be controverted by the prosecution.² It has been sometimes said that proof of the good character of the defendant is available only in doubtful cases; but the better opinion is that it may be shown in any case, the weight of it being for the jury.³ Character is to be proved by general reputation, not by special instances of good or bad conduct.⁴

In certain cases of offences against women, the woman's character for chastity may be shown, as bearing on the question of consent.⁵

§ 130. **Testimony of Accomplice.**—It is sometimes urged that a defendant should not be convicted upon the testimony of an accomplice without corroboration.⁶ This, however, is not a rule of law. It is entirely within the discretion of the court whether it will caution the jury in this way; and a refusal so to do is no matter of exception.⁷ The practice in England is more uniform in felonies than in misdemeanors, in which latter case it is sometimes refused.⁸ In Georgia the rule is made applicable only in felonies.⁹ But a conviction on the uncorroborated evidence of an accomplice is good at common law. The principle which allows the evidence to go to the jury at all necessarily involves the right to believe and act

Rep. 483, 486, n.; *Ruloff v. P.*, 18 N. Y. 179; *Gray v. C.*, 101 Pa. 380.

¹ *P. v. Greenwall*, 108 N. Y. 296, 15 N. E. 404.

² *C. v. Webster*, 5 Cush. (Mass.) 295, 324.

³ *S. v. Northrup*, 48 Ia. 583, and cases cited; *C. v. Leonard*, 140 Mass. 473, 4 N. E. 96; *S. v. Daley*, 53 Vt. 442.

⁴ *S. v. Bloom*, 68 Ind. 54; *C. v. O'Brien*, 119 Mass. 342; *P. v. Greenwall*, *ante*.

⁵ *C. v. Kendall*, 113 Mass. 210; *Woods v. P.*, 55 N. Y. 515; *S. v. Reed*, 39 Vt. 417.

⁶ See *ante*, § 76.

⁷ *Smith v. S.*, 37 Ala. 472; *S. v. Litchfield*, 58 Me. 267.

⁸ *McClory v. Wright*, 10 Ir. Com. Law, 514; 1 Greenleaf, Evidence, § 382, n.

⁹ *Parsons v. S.*, 43 Ga. 197.

upon it.¹ But by statute in Iowa and Texas, and perhaps other States, there must be corroboration.²

§ 131. **Fresh Complaint.** — In rape cases, evidence is admissible that the woman made complaint of the ill usage as soon as she was able to do so; but not, in most jurisdictions, the particulars of the complaint.³ In some States, however, all the particulars of the complaint are allowed to be given in corroboration.⁴

§ 132. **Dying Declarations.** — In trials for homicide, declarations of the deceased made in contemplation of death are admissible to prove the circumstances of the killing, in favor of the prisoner, as well as against him.⁵ The declaration must be a statement of fact,⁶ and it must appear that the deceased was conscious that he was at the point of death.⁷ If he was so conscious, the declaration is admissible, though in fact he lived several days;⁸ and if not so conscious it is inadmissible, though he died at once.⁹

¹ *S. v. Wolcott*, 21 Conn. 272; *Collins v. P.*, 98 Ill. 584; *Dawley v. S.*, 4 Ind. 128; *S. v. Prudhomme*, 25 La. Ann. 522; *C. v. Bosworth*, 22 Pick. (Mass.) 397; *C. v. Holmes*, 127 Mass. 424, 34 Amer. Rep. 391, 408, n.; *Hamilton v. P.*, 29 Mich. 173; *S. v. Hyer*, 39 N. J. L. 598; *P. v. Costello*, 1 Denio (N. Y.) 83; *Lindsay v. P.*, 63 N. Y. 143; *S. v. Holland*, 83 N. C. 624; *Kilrow v. C.*, 89 Pa. 480; *U. S. v. Kessler*, 1 Bald. C. Ct. 15, Fed. Cas. No. 15,528; *contra*, *P. v. Ames*, 39 Cal. 403.

² *Smith v. S.*, 37 Ala. 472; *S. v. Moran*, 34 Ia. 453; *Lopez v. S.*, 34 Tex. 133.

³ *Reg. v. Walker*, 2 M. & R. 212.

⁴ *S. v. Kinney*, 44 Conn. 153.

⁵ *Reg. v. Scaife*, 1 Moo. & R. 551.

⁶ *Collins v. C.*, 12 Bush (Ky.) 271; *P. v. Shaw*, 63 N. Y. 36; Whart. Crim. Ev., § 294.

⁷ *S. v. Wagner*, 61 Me. 178; *C. v. Casey*, 11 Cush. (Mass.) 417; *Sullivan v. C.*, 93 Pa. 284.

⁸ *C. v. Cooper*, 5 All. (Mass.) 495.

⁹ *Reg. v. Jenkins*, L. R. 1 C. C. 187.

CHAPTER III.

OFFENCES AGAINST THE GOVERNMENT.

§ 134. Treason.	§ 146. Embracery.
140. Bribery.	147. Perjury.
111. Extortion and Oppression.	154. Contempt.
143. Barratry.—Champerty.—Main- tenance.	159. Rescue. — Escape. — Prison Breach.

§ 133. **Introductory.** — In the following chapters, the more important offences will be considered more at large. It is to be borne in mind that there is no sharply defined line between criminal and merely civil offences; the difference is only one of degree. There is no limit to the number of crimes. Those that will be described are only a few, which from their more frequent occurrence or their greater importance it has become possible to define with exactness.

The first class of crimes consists of offences against the public in its corporate capacity; against the government itself, or some department of it. The most heinous crime of this sort is treason. Other important crimes are bribery, extortion, and oppression; offences against justice, such as barratry, champerty and maintenance, embracery, perjury, and contempt; and prison breach and kindred crimes.

TREASON.

§ 134. At common law there are two kinds of treason: first, disloyalty to the King, or a violation of the allegiance due him, which was of the highest obligation, and hence called *high* treason; and, secondly, a violation of the allegiance or duty owed by an inferior to a superior, as of a wife to the husband, a servant to his master, or an ecclesiastic to his lord or ordinary, — either of which inferiors, if they should kill

their superior, were held guilty of *petit* treason.¹ There is now, however, neither in England nor in this country any such classification of treasons, — *petit* treasons being everywhere punished as homicides.

§ 135. **Definition.** — By the ancient common law, the crime of treason was not clearly defined, whence arose, according to the arbitrary discretion of the judges and the temper of the times, a great number of modes by which it was held treason might be committed, not important to be here detailed. The inconvenience of such uncertainty as to the law led to the enactment of the Stat. 25 Edw. III. c. 2, which, confirmed and made perpetual by 57 Geo. III. c. 6, defines the law of England upon the subject, enumerating a large number of specific acts which may constitute the offence. Only two of these, however, are treasonable in this country.²

By the Constitution of the United States,³ treason is declared to consist only “in levying war against them, or in adhering to their enemies, giving them aid and comfort”; and this must be by a person owing allegiance to the United States.⁴ Substantially the same definition is adopted by the several States, some of them, however, setting out, either in their constitutions or the statutes, at some length, the particular methods of adhesion and of giving aid and comfort which shall constitute treason.

§ 136. **War May Be Levied**, not only by taking arms against the government, but under pretence of reforming religion or the laws, or of removing evil counsellors, or other grievances, whether real or pretended. To resist the government forces by defending a fort against them is levying war, and so is an insurrection with an avowed design to put down all enclosures, all brothels, or the like; the universality of the design making it a rebellion against the State and a usurpation of the power of government. But a tumult, with a view

¹ 4 Bl. Com. 75; *Resp. v. Chapman*, 1 Dall. (Pa.) 53.

² Stephen's Dig. Cr. Law, art. 51 et seq.

³ Art. 3, § 3.

⁴ As to what constitutes allegiance, see Kent Com. (12th ed.), pp. 39 et seq.

to pull down a particular house or lay open a particular enclosure, amounts at best to riot, there being no defiance of public government.¹ An insurrection to prevent the execution of an act of Congress altogether, by force and intimidation, is levying war;² but forcible resistance to the execution of such an act for a present purpose, and not for a purpose of a public and general character, does not amount to treason;³ nor does the mere enlistment of men into service.⁴ There must be, to constitute an actual levy of war, an assemblage of persons met for a treasonable purpose, and some overt act done, or some attempt made by them, with force, to execute, or toward executing, that purpose. There must be a present intention to proceed to the execution of the treasonable purpose by force. The assembly must be in a condition to use force, if necessary, to further, or to aid, or to accomplish their treasonable design. If the assembly is arrayed in a military manner for the express purpose of overawing or intimidating the public, and to attempt to carry into effect their treasonable designs, that will, of itself, amount to a levy of war, although no actual blow has been struck or engagement has taken place.⁵ So, aiding a rebellion by fitting out a vessel to cruise against the government rebelled against in behalf of the insurgents, is levying war, whether the vessel sails or not.⁶ So is a desertion to, or voluntary enlistment in, the service of the enemy.⁷

In England, "levying war" is held to mean: 1st. Attacking, in the manner usual in war, the Sovereign himself, or his military forces, acting as such by his orders in the execution of their duty; 2d. Attempting by an insurrection, of whatever nature, by force or constraint, to compel the Sovereign to

¹ 4 Bl. Com. 81, 82; *post*, §§ 165, 166.

² U. S. v. Mitchell, 2 Dall. (Pa.) 348.

³ U. S. v. Hoxie, 1 Paine C. Ct. 265, Fed. Cas. No. 15,407; U. S. v. Hauway, 2 Wall. Jr. C. Ct. 139, Fed. Cas. No. 15,299.

⁴ *Ex parte Bollman*, 4 Cranch (U. S.) 75.

⁵ Burr's Trial, 401. See also 14 Law Reporter, p. 413

⁶ U. S. v. Greathouse, 2 Abb. C. Ct. 364, Fed. Cas. No. 15,254.

⁷ Roberts's Case, 1 Dall. (Pa.) 39; McCarty's Case, 2 Dall. (Pa.) 86; U. S. v. Hodges, 2 Wheeler's Cr. Cas. 477, Fed. Cas. No. 15,374.

change his measures or counsels, or to intimidate or overawe both Houses or either House of Parliament; and, 3d. Attempting, by an insurrection of whatever kind, to effect any general public object. But an insurrection, even conducted in a warlike manner, against a private person, for the purpose of inflicting upon him a private wrong, is not levying war, in a treasonable sense.

Adhering to the Sovereign's enemies is held to be active assistance within or without the realm to a public enemy at war with the Sovereign. Rebels may be public enemies, within the meaning of the rule.¹

§ 137. **Who May Commit.** — Treason involves a breach of allegiance; a foreigner not in the country cannot therefore be guilty of the crime. But even an alien owes allegiance to the laws of the country in which he is, and is bound to abide by them. He may therefore be guilty of treason by giving aid and comfort to an enemy of that country.²

§ 138. **Misprision of Treason** is the concealment, by one having knowledge, of any treason committed or (in some of the States) contemplated, or the failure to make it known to the government.³

§ 139. **Evidence.** — The rule is incorporated into the Constitution of the United States, and into those of most of the States, that treason can only be proved by the evidence of two witnesses to the same overt act, or by confession in open court. Unless the overt act is so proved, all other evidence is irrelevant.⁴ But an overt act being proved by two witnesses, all other requisite facts may be proved by the testimony of a single witness.⁵

The common law rule was that there must be two witnesses; but it was held sufficient if one testified to one overt act, and another to another. And this may be the rule now in those States whose constitutions or statutes do not contain

¹ Stephen's Dig. Cr. Law, arts. 53 and 54.

² *Carlisle v. U. S.*, 16 Wall. 147.

³ See the Constitutions and statutes of the several States.

⁴ *U. S. v. Burr*, 4 Cranch, 493.

⁵ *U. S. v. Mitchell*, 2 Dall. (Pa.) 348.

the explicit language of the Constitution of the United States.¹ The ordinary rules of evidence generally prevail in the proof of misprisions.²

A confession not in court may be proved by the testimony of one witness, as corroborating other testimony in the case; but in those States prohibiting conviction unless upon confession in open court, it cannot be made the substantive ground of conviction.³

BRIBERY.

§ 140. **Bribery** is a misdemeanor at common law,⁴ and has generally been defined as the offering or receiving of any undue reward to or by any person whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and induce him to act contrary to the known rules of honesty and integrity.⁵ But in more modern times the word has received a much broader interpretation, and is now held to mean the corruptly offering, soliciting, or receiving of any undue reward as a consideration for the discharge of any public duty. Strictly speaking, an offer to give or receive a bribe is only an attempt,⁶ and the receipt of a bribe is the consummated offence. But as long ago as 1678 a standing order of the House of Commons made it bribery as well to offer as to receive, and so at the present day either the offering or receiving is held to constitute the offence, and an actual tender of the bribe is not necessary.⁷

By undue reward is meant any pecuniary advantage, direct or indirect, beyond that naturally attached to or growing out of the discharge of the duty. Thus, voting is a public duty,

¹ Stat. 7 Will. III, c. 3, § 2; R. S. New York, vol. ii, p. 890, § 15; 3 Greenl. Ev., § 246, and notes.

² 3 Greenl. Ev., § 247.

³ Roberts's Case, 1 Dall. (Pa.) 39; McCarty's Case, 2 Dall. (Pa.) 86.

⁴ 1 Hawk. P. C., bk. 1, c. 67, § 6.

⁵ Coke, 3d Inst. 145; 3 Greenl. Ev., § 71.

⁶ Walsh v. P., 65 Ill. 58.

⁷ S. v. Woodward, 182 Mo. 391, 81 S. W. 857.

and though no compensation is allowed, yet by the exercise of the right one may promote the public welfare, and thus indirectly his own. But if he sells or promises to sell his vote in consideration of any other private reward, it is an abuse of the trust, and an indictable offence;¹ as where A votes for B for one office, in consideration of B's vote for A for another.² And bribery even of a member of the nominating convention of a political party seems criminal at common law.³ And buying or promising to buy the vote is equally an offence, though the person selling refuses to perform the contract,⁴ or, if a legislator, has no jurisdiction in the premises,⁵ or in point of fact has no right to vote.⁶ So where a candidate for public office offered, in case of his election, to serve for less than the salary provided by law for the office, whereby the taxes would be diminished, this was held to be within the spirit of the law against bribery.⁷ So conduct inducing or tending to induce corrupt official action, as the offer of money to one having the power of appointment to office, to influence his action thereon;⁸ or to a sheriff or his subordinate having the custody of prisoners, to induce him to connive at their escape;⁹ or to a customs officer, to induce him to forbear making a seizure of goods forfeited by violation of the revenue laws.¹⁰ The theory of our government is that all public stations are trusts, and that those clothed with them are to be actuated in the discharge of their duties solely by considerations of right,

¹ *Reg. v. Lancaster*, 16 Cox C. C. 737; *S. v. Jackson*, 73 Me. 91.

² *C. v. Callaghan*, 2 Va. Cas. 460, C. 6.

³ *C. v. Bell*, 145 Pa. 374, 22 Atl. 641.

⁴ *Sulston v. Norton*, 3 Burr. 1235; *Henslow v. Fawcett*, 3 Ad. & El. 51.

⁵ *P. v. McGarry* (Mich.), 99 N. W. 147; *S. v. Ellis*, 4 Vroom (N. J.), 102, M. 23; *contra*, *S. v. Butler*, 178 Mo. 272, 77 S. W. 560.

⁶ *Combe v. Pitt*, 3 Burr. 1586.

⁷ *S. v. Purdy*, 36 Wis. 213. But see *Dishon v. Smith*, 10 Ia 212, where giving a note to the county as an inducement to the people to vote for the removal of the county seat was held not to be bribery.

⁸ *Rex v. Vaughan*, 4 Burr. 2491; *Rex v. Pollman*, 2 Camp. 229.

⁹ *Rex v. Beale*, 1 East, 183.

¹⁰ *Rex v. Everett*, 3 B. & C. 114. See also *Caton v. Stewart*, 76 N. C. 357.

justice, and the public good ; and any departure from the line of rectitude in this behalf, and any conduct tending to induce such departure, is a public wrong.¹ The offer of money to induce a public officer to resign office, the intent being that the defendant might be appointed in his place, is criminal bribery.² Under the statute³ which prohibits the payment of money to a voter to induce him to vote, it has been held to be an offence to pay the travelling expenses of the voter to and from the polling places.⁴

EXTORTION AND OPPRESSION.

§ 141. **Extortion** is the demanding and taking of an illegal fee, under color of office, by a person clothed by the law with official duties and privileges.⁵ The fee is illegal, if demanded and taken before it is due, or if it be a greater amount than the law allows, and, of course, if not allowed at all by law. Thus, it is extortion for a justice of the peace to exact costs where they are not properly taxable, or from the party to whom they are not taxable ;⁶ or for a jailer to obtain money of his prisoner by color of his office ;⁷ or for a ferryman⁸ or miller⁹ to collect tolls not warranted by custom ; or for a county treasurer to exact fees for acts required in the collection of taxes, but which had not been done ;¹⁰ or for a coroner¹¹ or sheriff to refuse to do their official duty unless their fees are

¹ *Trist v. Child*, 21 Wall. (U. S.) 441.

² *Reg. v. Mercer*, 17 Up. Can. Q. B. 602 (*semble*).

³ 17 & 18 Vict. c. 102.

⁴ *Cooper v. Slade*, 6 H. L. C. 746.

⁵ *Rex v. Baines*, 6 Mod. 192 ; *Ming v. Truett*, 1 Mont. 322. For distinction between bribery and corruption see *Levar v. S.*, 103 Ga. 42. 29 S. E. 467.

⁶ *P. v. Whaley*, 6 Cow. (N. Y.) 661 ; *Resp. v. Hannum*, 1 Yeates (Pa.).

71. So with a constable : *Levar v. S.*, *ante*.

⁷ *Rex v. Broughton*, Trem. P. C. 111.

⁸ *Rex v. Roberts*, 4 Mod. 101.

⁹ *Rex v. Burdett*, 1 Ld. Raym. 148.

¹⁰ *S. v. Burton*, 3 Ind. 93.

¹¹ *Rex v. Harrison*, 1 East P. C. 382.

prepaid;¹ or to demand and receive fees where none are by law demandable.² So it is extortion for an officer to avail himself of his official position to force others, by indirect means, to contribute to his pecuniary advantage to an amount and in a manner not authorized by law; as, for instance, for a sheriff to receive a consideration from A for accepting A as bail for C, whom he has arrested.³ That the illegal fee is in the form of a present, or other valuable thing than money, is immaterial;⁴ unless the gift be voluntary,⁵ in which case there is no offence committed. By a very strict construction, the taking a promissory note for illegal fees is held not to constitute the offence, as the note is void, cannot be enforced, and is therefore of no value.⁶ And the taking must be with a wrong intent,⁷ and not through mistake of fact⁸ or of law.⁹

§ 142. **Oppression** is such an abuse of discretionary authority by a public officer, from an improper motive, as consists in inflicting any other injury than extortion. Thus, where a judge inflicts an excessive sentence from unworthy motives, he is guilty of oppression.¹⁰ So where a public officer refuses to issue a license to an inn-keeper because he does not vote as the officer wishes, the officer is guilty of oppression.¹¹ And so where a magistrate punishes a defendant without pursuing the forms of law, he is guilty of oppression.¹²

¹ *Hescott's Case*, 1 Salk. 330; *C. v. Bagley*, 7 Pick. (Mass.) 279; *S. v. Vassel*, 47 Mo. 416, 444; *S. v. Maires*, 4 Vroom (N. J.), 142.

² *C. v. Mitchell*, 3 Bush (Ky.), 25; *Simmons v. Kelley*, 33 Pa. 190.

³ *Stotesbury v. Smith*, 2 Burr. 924; *Rex v. Higgins*, 4 C. & P. 247; *Rex v. Burdett*, 1 Ld. Raym. 118; *Rex v. Loggen*, 1 Stra. 73; *P. v. Calhoun*, 3 Wend. (N. Y.) 420.

⁴ *Rex v. Eyres*, 1 Sid. 307.

⁵ *C. v. Dennie*, Th. Cr. Cas. (Mass.) 165.

⁶ *C. v. Cony*, 2 Mass. 523; *U. S. v. Driggs*, 125 Fed. 520. But see *Empson v. Bathurst*, Int. 52; *C. v. Pease*, 16 Mass. 91.

⁷ *Cleveland v. S.*, 34 Ala. 254; *S. v. Stotts*, 5 Blackf. (Ind.) 460; *Resp. v. Hannum*, 1 Yeates (Pa.), 71.

⁸ *Bowman v. Blythe*, 7 E. & B. 26.

⁹ *S. v. Cutter*, 36 N. J. L. 125, M. 241; *P. v. Whaley*, 6 Cow. (N. Y.) 661.

¹⁰ *Steph. Dig. Cr. Law*, § 119 (1).

¹¹ *Rex v. Williams*, 2 Burr. 1317.

¹² *Rex v. Okey*, 8 Mod. 46.

§ 142a. **Other Official Misconduct.** — Extortion and oppression are but two illustrations of the general principle that the public has a right to be honestly served by its officers, and that any dereliction of duty by them is punishable; it is immaterial whether it consists in a wrongful doing, or in a wrongful failure to do. Thus a license commissioner is indictable for corruptly giving a license to an unfit person;¹ a justice for discharging a prisoner without proper bail;² a constable for unnecessarily and maliciously binding a prisoner,³ a city council for corruptly, though not extortiously, awarding a contract to other than the lowest responsible bidder.⁴ So also, the mayor of a city is indictable for failing to take proper steps to suppress a riot;⁵ a town clerk for not properly keeping the town records.⁶

BARRATRY, CHAMPERTY, MAINTENANCE.

§ 143. **Barratry, Champerty, and Maintenance** are kindred offences. The encouragement of strife was regarded by the common law as a matter of public concern, and it interposed to punish and prevent it. There were two special forms which this encouragement assumed: one, where a stranger in interest takes part in the promotion of a controversy under an agreement that he shall have part of the proceeds, is called *champerty*, because it is an agreement *campum partire*, — to divide the spoils; the other, where one officiously and without just cause intermeddles with and promotes the prosecution or defence of a suit in which he has no interest, is called *maintenance*.

Barratry is habitual champerty or maintenance, and is committed where one has become so accustomed to intermeddle in strifes and controversies in and out of court that he may be said to be a common mover, exciter, or maintainer of suits and

¹ *Rex v. Holland*, 1 T. R. 692; *P. v. Norton*, 7 Barb. (N. Y.) 477.

² *P. v. Coon*, 15 Wend. (N. Y.) 277.

³ *S. v. Stalcup*, 2 Ired. (N. C.) 50.

⁴ *S. v. Kern*, 51 N. J. L. 259, 17 Atl. 114.

⁵ *Reg. v. Neale*, 9 C. & P. 431.

⁶ *S. v. Buxton*, 2 Swan (Tenn.), 57. On the question of intent in these cases see *ante*, §§ 52-58.

quarrels ; as one becomes a common scold by the too frequent and habitually abusive use of the tongue, or a common seller of liquor, by habitually selling it in violation of law. A single act is sufficient upon which to maintain an indictment either for champerty or maintenance ; but a series of acts, not less than three, are necessary to constitute the habit, which is the gist of the crime of barratry.¹

The offence of barratry may be committed by a justice of the peace who stirs up prosecutions to be had before himself for the sake of fees ;² and, it seems, by one who unnecessarily, and for the purpose of opposing his adversary, brings numerous ungrounded suits in his own right.³

§ 144. *Interest.* — The intervention, in order to constitute the crime of maintenance, must be without interest. If one may be prejudiced by the result of the suit, or has a contingent interest therein, as if a vendee has warranted title to the vendor, he has an interest which justifies the intervention.⁴ So if the party intermeddling has a special interest in the general question to be decided, though not otherwise in the result of the particular suit, his intervention is not unlawful.⁵ In short, if the party have any interest, legal or equitable, though it be but a contingent interest, he may assist another in a lawsuit. Any substantial privity or concern in the suit will justify him.⁶ So where a creditor of a bankrupt took an assignment of a right of action from the trustee in bankruptcy, agreeing to sue at his own expense and pay one-fourth of what was realized to the trustee, the transaction was not champertous, since the creditor had an interest.⁷

¹ 4 Bl. Com. 134, 135 ; *C. v. Davis*, 11 Pick. (Mass.) 432 ; *C. v. McCulloch*, 15 Mass. 227 ; *C. v. Tubbs*, 1 Cush. (Mass.) 2 ; *Case of Barratry*, 8 Coke, 36, which contains much of the early learning on the subject.

² *S. v. Chitty*, 1 Bail. (S. C.) 379.

³ *C. v. McCulloch*, *ante* ; 1 Hawk. P. C., c. 81, § 3.

⁴ *Master v. Miller*, 4 T. R. 320 ; *Williamson v. Sammons*, 34 Ala. 691 ; *Goodspeed v. Fuller*, 46 Me. 141.

⁵ *Gowen v. Nowell*, 1 Greenl. (Me.) 292 ; *Davies v. Stowell*, 78 Wis. 334, 47 N. W. 370.

⁶ *Wickham v. Conklin*, 8 Johns. (N. Y.) 220.

⁷ *Guy v. Churchill*, 40 Ch. D. 481.

§ 145. **Officious.** — The intervention must also be officious, and without just cause. If, therefore, the relationship of the parties or their circumstances be such as to warrant the belief that the intervention is of a friendly kind, in the interest of justice, and to prevent oppression, it will not now, — whatever may have been the extravagant notions of the old lawyers,¹ adopted under the pressure of the opinion that such intervention tended to the formation of combinations calculated to obstruct if not overawe the courts, — be held to be criminal.² The intervention is not officious or unjustifiable, if prompted by personal sympathy growing out of relationship, or long association, as between master and servant,³ or by motives of charity.⁴ The common law of champerty and maintenance is still recognized in some of the States, though a much less degree of interest will now justify the intervention than formerly.⁵ And in these States an agreement by an attorney to carry on a lawsuit, making no disbursements, and to look to a share of the proceeds for the compensation of his services, is held to be clearly champertous.⁶ Other States, however, deny that the law of maintenance and champerty was ever applicable to this country, and refuse to recognize it as in force.⁷

In point of fact, the tendency is to disregard the common

¹ 1 Hawk. P. C., c. 83, §§ 4 et seq.

² *Lathrop v. Amherst Bank*, 9 Met. (Mass.) 489.

³ *Campbell v. Jones*, 4 Wend. (N. Y.) 306; *Thalhimer v. Brinkerhoff*, 3 Cow. (N. Y.) 623.

⁴ *Perine v. Dunn*, 3 Johns. Ch. (N. Y.) 508.

⁵ *Wood v. McGuire*, 21 Ga. 576; *Lathrop v. Amherst Bank*, 9 Met. (Mass.) 489.

⁶ *Lathrop v. Amherst Bank*, *ante*. See also *Elliott v. McClelland*, 17 Ala. 206; *Martin v. Clarke*, 8 R. I. 389.

⁷ *Bayard v. McLean*, 3 Harr. (Del.) 139; *Newkirk v. Cone*, 18 Ill. 449; *Wright v. Meek*, 3 Greene (Ia.), 472; *Schomp v. Schenck*, 40 N. J. L. 195; *Stanton v. Sedgwick*, 14 N. Y. 289; *Key v. Vattier*, 1 O. 132; *Sherley v. Riggs*, 11 Humph. (Tenn.) 53; *Bentinck v. Franklin*, 38 Tex. 458; *Danforth v. Streeter*, 28 Vt. 490; *Richardson v. Rowland*, 40 Conn. 565. See also note to the last cited case, 2 Green's Cr. Law Rep. 495, for some interesting details of the state of society out of which grew the law of maintenance and other analogous crimes.

law, except so far as it may have been adopted by statute;¹ and it may be doubted if any indictment would now be maintained for champerty or maintenance, not coming strictly within the limits of some precedent. The practices out of which originated the common and early English statute laws against the offences of champerty and maintenance, — among which a common one was for a party litigant to interest some “great person” to come in and aid him to overwhelm his antagonist by giving him a share of the proceeds, — are not now so common as to require the interposition of the aid of the criminal law. And it is, to say the least, very doubtful whether, at the present day, an indictment for either offence, pure and simple, and unattended by circumstances of aggravation which would amount to a hindrance or perversion of justice, would be sustained in any of our courts.²

Questions concerning them have usually arisen in civil actions, in which a champertous contract has been set up as a defence. And here the courts are inclined, without much regard to the old common law precedents, to hold such contracts as are clearly against a sound public policy, and only such, as champertous.³

Thus, where an attorney agrees to carry on a suit at his own expense for a share of the proceeds, this seems generally held to be champertous;⁴ but not where the expense is to be borne by the party.⁵ And even in such case, if the suit is against the government, and there is no danger that a “great person” may bear down and oppress a weak defendant, the reason of the law failing, the rule itself fails; and accordingly it has been recently held that an agreement by an attorney to carry on a suit against the United States in the Court of

¹ See note to *Richardson v. Rowland*, 14 Am. L. Reg. n. s. 78.

² Note to *Richardson v. Rowland*, 2 Green's Cr. Law Rep. 495; *Maybin v. Raymond*, 15 Nat. Bkr. Reg. (U. S. C. Ct., South Dist. Miss.) 354, Fed. Cas. No. 9,338; 2 Bish. Cr. Law, 7th ed., §§ 125, 126.

³ *Key v. Vattier*, 1 O. 132.

⁴ *Lancy v. Havender*, 146 Mass. 615, 16 N. E. 464; *Martin v. Clarke*, 8 R. I. 389; *Stearns v. Felker*, 28 Wis. 594.

⁵ *Winslow v. Ry. Co.*, 71 Ia. 197, 32 N. W. 330; *Aultman v. Waddle*, 40 Kan. 195, 19 P. 730.

Claims, at his own expense, for a portion of the proceeds, is not champertous.¹ Nor is an agreement to pay an attorney a fixed sum for his services “out of the proceeds of sales of the property [real estate], as such proceeds shall be realized.”²

EMBRACERY.

§ 146. **Embracery** is an attempt, by corrupt means, to induce a juror to give a partial verdict. Any form of tampering with a jury, whether successful or not is immaterial, constitutes the crime.³ The means most commonly resorted to are promises, entertainments, presents, and the like. But any means calculated and intended to cause a juror to swerve from his duty, if used, will make the person using them for that purpose indictable at common law. As the crime is in itself an attempt, it is complete whether successful or not in its purpose, whether the verdict be just or unjust, and even if there be no verdict.⁴ A juror may be guilty of embracery, by the use of corrupt and unlawful methods of influencing his fellows, or of obtaining a position on the jury with intent to aid either party.⁵

PERJURY.

§ 147. “**Perjury**, by the common law, seemeth to be a wilful false oath, by one who, being lawfully required to depose the truth in any proceeding in a course of justice, swears absolutely, in a matter of some consequence, to the point in question, whether he be believed or not.”⁶ Modern legislation has allowed persons having conscientious scruples against taking an oath to substitute an affirmation for the oath.

¹ *Maybin v. Raymond*, 15 Nat. Bkr. Reg. 354, Fed. Cas. No. 9,338. So of the Court of Alabama Claims: *Manning v. Sprague*, 148 Mass. 18, 18 N. E. 673.

² *McPherson v. Cox*, 96 U. S. 404.

³ 1 Hawk. P. C., 8th ed. 466; *P. v. Myers*, 70 Cal. 582, 12 P. 719.

⁴ *S. v. Sales*, 2 Nev. 268; *Gibbs v. Dewey*, 5 Cow. (N. Y.) 503.

⁵ *Rex v. Opie et al.*, 1 Saund. 301.

⁶ 1 Hawk. P. C., 8th. ed. 429; *C. v. Pollard*, 12 Met. (Mass.) 225; *S. v. Wall*, 9 Yerg. (Tenn.) 347; *S. v. Simons*, 30 Vt. 620.

An oath is a declaration of a fact made under the religious sanction of an appeal to the Supreme Being for its truth.

An affirmation is substantially like an oath, omitting the sanction of an appeal to the Supreme Being, and substituting therefor the "pains and penalties" of perjury.

The proper form of administering either is that which is most binding on the conscience of the affiant, and in accordance with his religious belief. But the form is not essential, even though it be prescribed by statute, if there be a substantial compliance, — the prescription being regarded as directory merely.¹ And therefore, if a book other than the Evangelists be unwittingly used, it does not vitiate the oath.² Nor can a prosecution for perjury be sustained upon testimony given orally which the law requires to be in writing,³ nor upon an affidavit not required by law.⁴ But when the witness is sworn generally to tell the truth, instead of to make true answers, according to the usual practice, false testimony is still perjury.⁵

§ 148. **Lawfully Required.** — But, to be valid, the oath must be administered by a court or magistrate duly authorized. If a court having no jurisdiction of the person or subject matter, or magistrate not duly authorized or qualified, administer the oath, it has no binding force or legal efficacy, and no prosecution for perjury can be predicated upon it. It is extra-judicial if the law does not require the oath, or, the oath being required, if an unauthorized person administers it.⁶ Thus, as

¹ *Rex v. Haly*, 1 C. & D. (Ire.) 199; *C. v. Smith*, 11 Allen (Mass.), 243.

² *Ashburn v. S.*, 15 Ga. 246; *P. v. Cook*, 4 Seld. (N. Y.) 67.

³ *S. v. Trask*, 42 Vt. 152; *S. v. Simons*, 30 Vt. 620.

⁴ *P. v. Gage*, 26 Mich. 30; *Ortner v. P.*, 6 T. & C. (N. Y. S. C.) 548.

⁵ *S. v. Keene*, 26 Me. 33.

⁶ *Pankey v. P.*, 1 Scammon (Ill.), 80; *Muir v. S.*, 8 Blackf. (Ind.) 154; *S. v. Plummer*, 50 Me. 217; *P. v. Travis*, 4 Parker (N. Y.), C. C. 213; *Lambert v. P.*, 76 N. Y. 220; *S. v. Wyatt*, 2 Hay. (N. C.) 56; *S. v. Hayward*, 1 N. & McC. (S. C.) 546; *C. v. Pickering*, 8 Grat. (Va.) 628; *U. S. v. Babcock*, 4 McLean (C. Ct.), 113, Fed. Cas. No. 14,488; *U. S. v. Howard*, 37 Fed. 666. Compare *S. v. Kirkpatrick*, 32 Ark. 117.

illustrations of the first point, it has been held that, if a party to the record be sworn, the law not admitting him as a competent witness, false testimony by him is no perjury.¹ So it has been held that it is no perjury to swear falsely to a place of residence in obtaining a certificate of naturalization, the oath to that fact being voluntary and immaterial under the law.² So to take a wilfully false oath as to the non-mineral character of homestead land is not perjury, where the oath is not called for by the statute, although required by a departmental regulation, the latter being held forbidden by the language of the statute.³ So if an immaterial allegation of fact be introduced and sworn to in a petition to court.⁴ So where a bill in equity is sworn to where the oath is not required.⁵ Nor will a false answer in chancery, the bill not calling for a sworn answer, amount to perjury.⁶

Similarly, as to the other requirement: even though the oath be required, if the court administering it has no jurisdiction, as where a police court wrongfully attempts to try a larceny⁷ or burglary⁸ case, or for any other reason has no jurisdiction;⁹ or the official administering the oath is incompetent to do so,¹⁰ the defendant cannot be held guilty of perjury. But if jurisdiction and authority exist, formal irregularities,—as

¹ *S. v. Hamilton*, 7 Mo. 300.

² *S. v. Helle*, 2 Hill (S. C.), 290.

³ *U. S. v. Maid*, 116 Fed. 650.

⁴ *Gibson v. S.*, 44 Ala. 17. See also *Klug v. McPhee*, 16 Col. App. 39, 63 P. 709; *S. v. Hamilton*, *ante*.

⁵ *P. v. Gaige*, 26 Mich. 30.

⁶ *Silver v. S.*, 17 O. 365.

⁷ *S. v. Jenkins*, 26 S. C. 121, 1 S. E. 437.

⁸ *S. v. Wymberley*, 40 La. Ann. 460, 4 So. 161.

⁹ *Collins v. S.*, 78 Ala. 433; *Renew v. S.*, 79 Ga. 162, 4 S. E. 19; *S. v. Furlong*, 26 Me. 69; *S. v. McCone*, 59 Vt. 117, 7 Atl. 406.

¹⁰ *Custodes v. Gwinn*, Style 336, K. 416, M. 959; *S. v. Cannon*, 79 Mo. 343; *S. v. Peters*, 57 Vt. 86. But mere irregularities in the appointment are no defence; *Markey v. S.* (Fla.), 37 So. 53; *S. v. Woolridge* (Or.), 78 P. 333; *Manning v. S.* (Tex.), 81 S. W. 957. It is sufficient that the judge was such *de facto*, so that the judgment would have been binding on the parties: *S. v. Williams*, 61 Kan. 739, 60 P. 1050; *Morford v. Terr.*, 10 Okl. 741, 63 P. 958.

where the witness is sworn to tell the truth and the whole truth, omitting from the oath the words "and nothing but the truth,"¹ or there is error in some of the proceedings, of which the oath is a part,² — are immaterial.

§ 149. "**Judicial Proceeding**" embraces not only the main proceeding, but also subsidiary proceedings incidental thereto; as a motion for continuance,³ or an affidavit initiatory of a proceeding⁴ or in aid of one pending,⁵ or a motion for removal⁶ or for a new trial,⁷ or a hearing in mitigation of sentence⁸ or for taking bail,⁹ or on a preliminary inquiry as to the competency of a witness or juror.¹⁰ It also embraces any proceeding wherein an oath is required by statute,¹¹ if the oath is to an existing fact, and not merely promissory.¹² It has also been held to embrace a proceeding required or sanctioned by "the common consent and usage of mankind."¹³

§ 150. **Wilfully False.** — The oath must be wilfully false to constitute the offence. If it be taken by mistake, or in the belief that it is true, or upon advice of counsel, sought and given in good faith, that it may lawfully be taken, the offence is not committed.¹⁴

¹ *P. v. Parent*, 139 Cal. 600, 73 P. 423; *S. v. Gates*, 17 N. H. 373.

² *S. v. Lavalley*, 9 Mo. 824. See also *S. v. Hall*, 7 Blackf. (Ind.) 25; *S. v. Dayton*, 3 Zab. (N. J.) 49; *Van Steenbergh v. Kortz*, 10 Johns. (N. Y.) 167; *U. S. v. Babcock*, 4 McLean (C. Ct.), 113, Fed. Cas. No. 14,488.

³ *Sanders v. P.*, 124 Ill. 218, 16 N. E. 81; *S. v. Shupe*, 16 Ia. 36.

⁴ *Rex v. Parnell*, 2 Burr. 806; *Carpenter v. S.*, 4 How. (Miss.) 163.

⁵ *Rex v. White, M. & M.* 271; *White v. S.*, 1 S. & M. (Miss.) 149.

⁶ *Walker v. Bryant*, 112 Ga. 412, 37 S. E. 749; *Pratt v. Price*, 11 Wend. (N. Y.) 127.

⁷ *S. v. Chandler*, 42 Vt. 446.

⁸ *S. v. Keenan*, 8 Rich. (S. C.) 456.

⁹ *C. v. Hatfield*, 107 Mass. 227.

¹⁰ *S. v. Wall*, 9 Yerg. (Tenn.) 347; *C. v. Stockley*, 10 Leigh (Va.), 678.

¹¹ Compare *P. v. Martin*, 175 N. Y. 315, 67 N. E. 589.

¹² *Rex v. Lewis*, 1 Strange, 70; *Avery v. Ward*, 150 Mass. 160, 22 N. E. 707; *S. v. Dayton*, 3 Zab. (N. J.) 49; *O'Bryan v. S.*, 27 Tex. App. 339.

¹³ *Arden v. S.*, 11 Conn. 408, M. 962; *S. v. Stephenson*, 4 McC. (S. C.) 165.

¹⁴ *Hood v. S.*, 44 Ala. 81; *Cothran v. S.*, 39 Miss. 541; *Tuttle v. P.*,

Some authorities hold that one may commit perjury notwithstanding he believes what he swears to be true, if it be made to appear that he had no probable cause for his belief.¹ But it certainly cannot be considered as established law, that one who swears inconsiderately, or rashly, or even negligently, to what he believes, though upon very insufficient data, to be true, is guilty of perjury.²

Oaths of office, being in the nature of promises of future good conduct, and not affirming or denying the truth or falsehood of an existing fact within the knowledge of the affiant, do not come within the provision of the law of perjury.³

It is immaterial whether the witness gives his testimony under compulsion, if his testimony be required by law,⁴ or of his own accord, as when he voluntarily gives privileged testimony;⁵ as also, it has been held, whether he is legally competent or incompetent to testify, if his testimony be actually taken.⁶ But this last proposition is not universally accepted as sound. In the former cases the testimony as such was good, it being a personal matter with the defendant whether he would give it or not. In the latter case the testimony is as a matter of law incompetent and the consent of the witness cannot render it any the less so.⁷

36 N. Y. 431, C. 528; U. S. v. Conner, 3 McLean (C. Ct.), 573, Fed. Cas. No. 14,847. Compare S. v. Allen, 94 Mo. App. 508, 69 S. W. 604.

¹ P. v. McKinney, 3 Parker C. C. (N. Y.) 510; S. v. Knox, Phil. (N. C.) 312; C. v. Cornish, 6 Binn. (Pa.) 249.

² 1 Hawk. P. C., c. 69, § 2; S. v. Lea, 3 Ala. 602; Jesse v. S., 20 Ga. 156; C. v. Thompson, 3 Dana (Ky.), 301; C. v. Brady, 5 Gray (Mass.), 78; S. v. Cockran, 1 Bailey (S. C.), 50; S. v. Chamberlain, 30 Vt. 559; C. v. Cook, 1 Rob. (Va.) 729; U. S. v. Shellmire, 1 Bald. (C. Ct.) 370, Fed. Cas. No. 16,271; U. S. v. Atkins, 1 Sprague, 558, Fed. Cas. No. 14,474; U. S. v. Stanley, 6 McLean (C. Ct.), 409, Fed. Cas. No. 16,376.

³ 1 Hawk. P. C., 8th ed., 431; S. v. Dayton, 3 Zab. (N. J.) 49.

⁴ C. v. Knight, 12 Mass. 274.

⁵ Mackin v. P., 115 Ill. 312, 3 N. E. 222; S. v. Maxwell, 28 La. Ann. 361; *contra*, U. S. v. Bell, 81 Fed. 830.

⁶ Chamberlain v. P., 23 N. Y. 85; S. v. Molier, 1 Dev. (N. C.) 263; Montgomery v. S., 10 O. 220.

⁷ Compare *ante*, § 148, and S. v. Keene, 26 Me. 33; P. v. Brown, 54 Mich. 15, 19 N. W. 571; P. v. Courtney, 94 N. Y. 490.

Swearing that a certain fact is true according to the affiant's knowledge and belief, is perjury, if he knows to the contrary, or if he believes to the contrary, even though the fact be true.¹ So, perhaps, if he have no knowledge or belief in the matter.² So, testimony that he does not remember certain material transactions when in fact he does.³

§ 151. **Materiality.** — That is material which tends to prove or disprove any fact in issue, although this fact be not the main fact in issue, but only incidental. Thus, where a woman was charged with larceny, and the defence was that the goods stolen belonged to her husband, a false statement under oath by the alleged husband that he had never represented that she was his wife is perjury, whether she was or was not in fact his wife. And it is also material whether it has any effect upon the verdict or not.⁴ Thus, the fact that the perjured testimony was given to a grand jury after they had ordered indictments drawn is no defence.⁵ So where three persons were indicted for a joint assault, and it was contended that it was immaterial, if all participated in it, by which certain acts were done, it was held that evidence attributing to one acts which were done by another was material.⁶ So all answers to questions put to a witness on cross-examination, which bear upon his credibility, are material.⁷ But substantial truth is all that is necessary,

¹ *Rex v. Pedley*, 1 Leach, 325; *S. v. Cruikshank*, 6 Blackf. (Ind.) 62; *Patrick v. Smoke*, 3 Strobb. (S. C.) 147; *Wilson v. Nations*, 5 Yerg. (Tenn.) 211; *U. S. v. Shellmire*, 1 Bald. (C. Ct.) 370, Fed. Cas. No. 16,271.

² 1 Hawk. P. C., 8th ed. 433; *S. v. Gates*, 17 N. H. 373.

³ *P. v. Doody*, 72 App. Div. (N. Y.) 372, 76 N. Y. S. 606.

⁴ 1 Hawk. P. C., 8th ed. 433; *C. v. Grant*, 116 Mass. 17, C. 537; *Wood v. P.*, 59 N. Y. 117.

⁵ *S. v. Faulkner*, 175 Mo. 546, 75 S. W. 116.

⁶ *S. v. Norris*, 9 N. H. 96.

⁷ *Reg. v. Overton*, C. & M. 655. For cases showing various states of facts under which the testimony of the defendant was held sufficiently material as affecting the credibility of witnesses, see *Reg. v. Baker*, L. R. [1895] 1 Q. B. 797, K. 419; *Reg. v. Tyson*, L. R. 1 C. C. 107, M. 964; *P. v. Barry*, 63 Cal. 62; *Brown v. S.* (Fla.), 36 So. 705; *S. v. Hunt*, 137 Ind. 537, 37 N. E. 409; *S. v. Strat*, 5 N. C. 124; *S. v. Miller* (R.I.), 58 Atl. 882. Compare *Reg. v. Holden*, 12 Cox C. C. 167, K. 418; *S. v.*

and slight variations as to time, place, or circumstance, will not, in general, be material; as where one swears to a greater or less number, or a longer or shorter time, or a different place, or a different weapon, than the true one, — these circumstances not bearing upon the main issue.¹ A false statement as to the terms of a contract which is void by the Statute of Frauds, made in a proceeding to enforce the contract, has been held to be immaterial, and no perjury, whichever way the party swears, the contract being void;² while a like false statement in a proceeding to avoid the contract would be material.³ And the fact that an indictment is bad, or that a judgment is reversed, does not affect the question of the materiality of the evidence given to sustain it;⁴ nor does the fact that the evidence is withdrawn from the case,⁵ or the fact that the officer taking the oath knew that it was false and took it to entrap the defendant.⁶ Whether materiality is a question of law for the court, or of fact for a jury, is a point upon which the authorities are about equally divided.⁷

§ 152. **Evidence.**—In prosecutions for perjury, a single witness (contrary to the general rule of evidence) to the falsehood of the alleged oath is not sufficient to maintain the case, since this would be but oath against oath. There must be two witnesses to the falsity, or circumstances corroborating a single witness;⁸ though all other material facts may be proved by

Brown, 68 N. H. 200, 38 Atl. 731; *S. v. Hattaway*, 2 N. & McC. (S. C.) 118, M. 961.

¹ 1 Hawk. P. C., c. 69, § 8.

² *Rex v. Dunston*, Ry. & M. 109.

³ *Reg. v. Yates*, C. & M. 132.

⁴ *Reg. v. Meek*, 9 C. & P. 513; *Maynard v. P.*, 135 Ill. 416, 25 N. E. 740; *C. v. Tobin*, 108 Mass. 426; *S. v. Brown*, 68 N. H. 200, 38 Atl. 731; *S. v. Rowell*, 72 Vt. 28, 47 Atl. 111.

⁵ *Reg. v. Phillpotts*, 3 C. & K. 135.

⁶ *Thompson v. S.*, 120 Ga. 132, 47 S. E. 566.

⁷ See the cases collected in 2 Greenl. Ev. (13th ed.) § 196, n.; also 2 Bish. Cr. Law, § 1039 a.

⁸ *Reg. v. Hook*, D. & B. 606, K. 422; *S. v. Raymond*, 20 Ia. 582, C. 534; *C. v. Pollard*, 12 Met. (Mass.) 225; *S. v. Heed*, 57 Mo. 252; *S. v. Molier*, 1 Dev. (N. C.) 263; *S. v. Peters*, 107 N. C. 876, 12 S. E. 74; *U. S. v. Hall*, 44 Fed. 864.

a single witness, as in other cases.¹ Nor can a man be convicted of perjury by showing that he has sworn both ways. It must be shown which was the false oath.²

§ 153. **Subornation.** — Subornation of perjury is the procuring of perjured testimony. In order to the incurring of guilt under this charge, it must appear that the party procuring the false testimony knew, not only that the testimony would be false, but also that it would be corrupt, or that the party giving the testimony would knowingly, and not merely ignorantly, testify falsely.³ And a conviction may be had upon the testimony of a single witness,⁴ unless that witness be the party who committed the perjury; in which case he will need corroboration.⁵ But a person cannot be convicted of attempted subornation of perjury by proof that he attempted to procure a person to swear falsely in a suit not yet brought, but which he intended to bring. There must be some proceeding pending, or the procured false testimony must constitute a proceeding in itself.⁶

§ 153a. **Offences Less than Perjury.** — It would seem clear that there may be a false swearing, not amounting to perjury and yet so prejudicial to society as to be punished as a crime.⁷

CONTEMPT.

§ 154. **Contempt of Court** is a crime indictable at common law when it amounts to an obstruction of public justice, and it is also, in many cases, summarily punishable, without in-

¹ *U. S. v. Hall*, 44 Fed. 864.

² *Reg. v. Hughes*, 1 C. & K. 519; *Jackson's Case*, 1 Lewin, 270; *S. v. Williams*, 30 Mo. 364; *S. v. J. B.*, 1 Tyler (Vt.), 269; *Schwartz v. C.*, 27 Grat. (Va.) 1025. But see *P. v. Burden*, 9 Barb. (N. Y.) 467, which, however, is examined and denied to be law in *Schwartz v. C.*, *ante*.

³ *S. v. Fahy*, 3 Penne. (Del.) 594, 54 Atl. 690; *C. v. Douglass*, 5 Met. (Mass.) 241; *Stewart v. S.*, 22 O. St. 477.

⁴ *C. v. Douglass*, *ante*.

⁵ *P. v. Evans*, 40 N. Y. 1.

⁶ *S. v. Joaquin*, 69 Me. 218; *P. v. Chrystal*, 8 Barb. (N. Y.) 545. But see *S. v. Whitemore*, 50 N. H. 245.

⁷ *Rex v. De Beauvoir*, 7 C. & P. 17; *Davidson v. S.*, 22 Tex. App. 372, 3 S. W. 662.

dictment, by the court, when its rules are violated, its authority defied, or its dignity offended.

It is the latter class of cases which constitute what are technically called contempts of court, and, though not well defined, may be said to embrace all corrupt acts tending to prevent the court from discharging its functions.

In the former case, it belongs to the category of crimes, though not bearing any specific name, and is included in the general class of offences against public justice.

In the latter case it is not strictly a crime, — though substantially so, being punishable by fine and imprisonment, — but is noticed summarily by the courts as an infraction of order and decorum, which every court has the inherent power to punish, within certain limits, — a power necessary to their efficiency and usefulness, and resorted to in case of violation of their rules and orders, disobedience of their process, or disturbance of their proceedings.¹ Since it is not a crime, a party accused is not entitled to trial by jury,² nor, save where provided by statute, to any particular mode of procedure.³

§ 155. **What Are Contempts.** — All disorderly conduct, or conduct disrespectful to the court, or calculated to interrupt or essentially embarrass its business, whether in the courtroom or out of it, yet so near as to have the same effect, such as making noises in its vicinity,⁴ refusal by a witness to

¹ *Ex parte Robinson*, 19 Wall. (U. S.) 505, 2 Green's Cr. Law Rep. 135. In Pennsylvania it is held (*Brooker v. C.*, 12 S. & R. 175) that a court not of record, as a justice of the peace, has not the power to proceed summarily to punish for contempt, the power not being necessary, as the justice may proceed immediately to bind over for indictment. But the case is unsupported elsewhere, and must stand, if it can stand at all, upon some peculiarity of the statutes of that State. See on this question and on the question of contempts of Legislative and other bodies, 2 Bish. New Cr. L., § 244 *et seq.*

² *McDonnell v. Henderson*, 74 Ia. 619, 33 N. W. 512; *In re Deaton*, 105 N. C. 59, 11 S. E. 244.

³ *Ex parte Terry*, 128 U. S. 289; *Ex parte Savin*, 131 U. S. 267; *accord*, *Hardin v. Silvani*, 114 Ia. 157, 86 N. W. 223; *Toozer v. S.* (Neb.), 97 N. W. 581.

⁴ *S. v. Coulter*, *Wright* (Ohio), 421.

attend court,¹ or to be sworn or to testify,² or of any officer of court to do his duty,³ or of a person to whom a *habeas corpus* is directed to make return,⁴ assaulting an officer of the court, or any other person in its presence,⁵ or one of the judges during recess,⁶ improperly communicating with a juror,⁷ or by a juror with another person,⁸ will usually be dealt with, upon their occurrence, *pendente lite*, in order to prevent the evil consequences of a wrongful interference with the course of justice.

In other cases, proceedings more or less summary will be had, whenever a corrupt attempt, by force, fraud, bribery, intimidation, or otherwise, is made to obstruct or impede the due administration of justice. Thus, the courts will take notice of, and punish in a summary way, the use by an attorney of contemptuous language in the pleadings,⁹ or a resort to the public press in order to influence the proceedings in a pending case,¹⁰ or any libellous publication, though indictable as such, relative to their proceedings, tending to impair public confidence and respect in them.¹¹ So the courts will intervene in like manner if attempts are made to bribe or intimidate a judge, juror, or any officer of court, in relation to any matter pending before them, or upon which they are to act officially.¹²

¹ *Johnson v. Wideman*, Dudley (S. C.), 70.

² *Ex parte Stice*, 70 Cal. 51, 11 P. 459; *Lott v. Burrell*, 2 Mill (S. C.), 167; *Stansbury v. Marks*, 2 Dall. (U. S.) 213.

³ *Chittenden v. Brady*, Ga. Dec. 219.

⁴ *S. v. Philpot*, Dudley (Ga.), 46.

⁵ *P. v. Turner*, 1 Cal. 152; *Ex parte Terry*, 128 U. S. 289.

⁶ *S. v. Garland*, 25 La. Ann. 532.

⁷ *S. v. Doty*, 32 N. J. L. 403.

⁸ *S. v. Helvenston*, R. M. Charl. (Ga.) 48.

⁹ *S. v. Keene*, 11 La. 596.

¹⁰ *Matter of Darby*, 3 Wheeler Cr. Cas. (N. Y.) 1.

¹¹ *Reg. v. Shipworth*, 12 Cox C. C. 371, 1 Green Cr. Law Rep. 121; *S. v. Morrill*, 16 Ark. 384; *P. v. Wilson*, 64 Ill. 195, 1 Am. Cr. Rep. 107; *S. v. Earl*, 41 Ind. 464; *In re Sturock*, 48 N. H. 428; *In re Cheeseman*, 49 N. J. L. 115, 6 Atl. 513; *P. v. Freer*, 1 Caines (N. Y.), 485; *In re Moore*, 63 N. C. 397; *Oswald's Case*, 1 Dall. (Pa.) 319.

¹² *Charlton's Case*, 2 M. & C. 316; *Reg. v. Onslow*, 12 Cox C. C. 358, 1 Green's Cr. Law Rep. 110; *S. v. Bee Pub. Co.*, 60 Neb. 282, 83 N. W. 201; *S. v. Doty*, 32 N. J. L. 403.

They will also punish the circulation of a printed statement of a pending case, before trial, by one of the parties to the prejudice of the other;¹ publishing a report of the proceedings of a trial, contrary to the direct order of court;² or publishing such proceedings with comments calculated to prejudice the rights of the parties;³ preventing the attendance of a witness, after summons, or procuring his absence, so that he could not be summoned;⁴ procuring a continuance by a false pretence of illness;⁵ and, generally, all such acts of any and all persons as tend substantially to interfere with their efficient service in the administration of justice for which they are established.

§ 155a. **Officers of the Court**, are equally amenable to it for misbehavior in their official capacity. Thus a sheriff may be attached for contempt for failing to levy properly,⁶ or for giving notice to a defendant so that he might escape a warrant issued for his arrest;⁷ so a clerk for refusing to issue a writ ordered by the court.⁸

An attorney is an officer of the court, and as such he may be punished for contempt if his conduct merits it. Thus, leading a lynching in the court-yard, although the court is not at the time in session;⁹ so advising a client to disobey the order of the court.¹⁰ And if the contempt is sufficiently gross,

¹ *Rex v. Jolliffe*, 4 T. R. 285; *In re Crown Bank*, 44 Ch. Div. 649; *Cooper v. P.*, 13 Colo. 337, 373, 22 P. 790.

² *Rex v. Clement*, 4 B. & Ald. 218.

³ *Reg. v. O'Dogherty*, 5 Cox C. C. 348.

⁴ *McConnell v. S.*, 46 Ind. 298; *Montgomery v. Judge*, 100 Mich. 436, 59 N. W. 148; *S. v. Buck*, 62 N. H. 670; *Fisher v. McDaniel*, 9 Wyo. 457, 64 P. 1056; *Ex parte Savin*, 131 U. S. 267. See also *Hale v. S.*, 55 O. St. 210, 45 N. E. 199.

⁵ *Welch v. Barber*, 52 Conn. 147.

⁶ *S. v. Tipton*, 1 Blackf. (Ind.) 166; *Pitman v. Clark*, 1 McMul. (S. C.) 316.

⁷ *S. v. O'Brien*, 87 Minn. 161, 91 N. W. 297.

⁸ *Terr. v. Clancy*, 7 N. M. 580, 37 P. 1108.

⁹ *Ex parte Wall*, 107 U. S. 265.

¹⁰ *Anderson v. Comptois*, 109 Fed. 971; *Terr. v. Clancy*, *ante*. See *P. v. Court*, 29 Colo. 182, 68 P. 242.

the punishment may be suspension or disbarment.¹ But a distinction must be made between the disciplinary power of a court to punish for contempts, which must be acts that affect the particular court that punishes, and are of the general character discussed above; and the right of the court to suspend or disbar attorneys for unprofessional conduct, although the circumstances may not amount to a contempt. The latter power can be exercised only when the conduct of the attorney is such as to show him unfit to be a member of the profession.² It is, however, disciplinary and summary in its nature, and is not governed by the rules of ordinary trials.³

§ 156. **Contempt of Process.**—One is guilty of contempt, and punishable therefor, who, being served with process by a court of competent jurisdiction, wilfully and improperly refuses to obey the process.⁴ Thus a refusal, after service of the writ or notice of the making⁵ of the order or decree, to obey an injunction,⁶ a decree or order of court,⁷ or a writ of prohibition or mandamus,⁸ is contempt. It is likewise contempt for an inferior court to disobey the orders of a superior court;⁹ or for an officer of court, as a receiver, to disobey the order of the court.¹⁰

¹ *Ex parte Wall*, ante.

² *Ex parte Robinson*, 19 Wall. (U. S.) 505.

³ *Re Hardwick*, L. R. 12 Q. B. D. 148. See further as to this distinction, *Beene v. S.*, 22 Ark. 149; *P. v. Turner*, 1 Cal. 143; *P. v. Goodrich*, 79 Ill. 148; *Re Delano*, 58 N. H. 5; *Matter of Eldridge*, 82 N. Y. 161; *Ex parte Bradley*, 7 Wall. (U. S.) 346.

⁴ 2 Bish. Crim. Law, § 242.

⁵ *S. v. Court*, 29 Mont. 230, 74 P. 412; *Williamson v. Pender*, 127 N. C. 481, 37 S. E. 495.

⁶ *Winslow v. Nayson*, 113 Mass. 411.

⁷ *Mayor of Bath v. Pinch*, 4 Scott 299; *Stuart v. Stuart*, 123 Mass. 370; *Buffum's Case*, 13 N. H. 14; *Yates v. Russell*, 17 Johns. (N. Y.) 461; *Knuckle v. Kunckle*, 1 Dall. (Pa.) 364.

⁸ *Rex v. Edyvean*, 3 T. R. 352; *Rex v. Babb*, 3 T. R. 579; *S. v. Judge of Civil District Court*, 38 La. Ann. 43; *Board of Commissioners of Leavenworth v. Sellew*, 99 U. S. 624.

⁹ *Patchin v. Mayor of Brooklyn*, 13 Wend. (N. Y.) 664.

¹⁰ *Tindall v. Westcott*, 113 Ga. 1114, 39 S. E. 450; *Cartwright's Case*, 114 Mass. 230; *Williamson v. Pender*, 127 N. C. 481, 37 S. E. 495; *Tornaus v. Melsing*, 106 Fed. 775.

Where the court is without jurisdiction in the premises, its order is of course ineffective, and a disobedience thereof is no contempt. Thus where a person was summoned as a witness and the court ordered him to execute a conveyance of land his refusal was no contempt.¹

§ 157. **Contempt of Jury.**—One may be punished for contempt by reason of misconduct before the grand jury,² or by publishing a libel on the grand or petit jury.³ And it is contempt for a reporter to conceal himself in the jury room, and to report the deliberations of the jurors.⁴

§ 158. **Proceedings.**—When the contempt is committed in the presence of the court, the offender may be ordered into custody, and proceeded against at once.

But if the offence be not committed in presence of the court, the offender is usually proceeded against by an attachment preceded by an order to show cause, but without an order to show cause if the exigency demands it.⁵

Whether proceedings will be had, in the last class of cases, for a contempt whereby the proceedings in a particular case are improperly obstructed or otherwise interfered with after the case is concluded, is perhaps not perfectly clear; but the better opinion seems to be that they may, at any time before the adjournment of the court for the term at which the contempt is committed.⁶ In a case apparently to the contrary⁷ there was no contempt, and the dictum is not supported by the citation of any authority.

¹ *Ex parte Pahia*, 13 Hawaii, 575; *accord*, *Tomsky v. Court*, 131 Cal. 620, 63 P. 1020; *S. v. Sommerville*, 105 La. 273, 29 So. 705. See *Gardner v. P.*, 100 Ill. App. 254.

² *In re Gannon*, 69 Cal. 541, 11 P. 240.

³ *Little v. S.*, 90 Ind. 338; *In re Cheeseman*, 49 N. J. L. 115, 6 Atl. 513.

⁴ *P. v. Barrett*, 56 Hun (N. Y.), 351.

⁵ *Welch v. Barber*, 52 Conn. 147; *Whittem v. S.*, 36 Ind. 196; *S. v. Matthews*, 37 N. H. 450; *P. v. Kelly*, 24 N. Y. 74.

⁶ *Reg. v. O'Dogherty*, 5 Cox C. C. 348; *Johnson v. Wideman*, *Dudley (Ga.)*, 70; *Clarke's Case*, 12 Cush. (Mass.) 320.

⁷ *Robertson v. Bingley*, 1 McCord (S. C.), Ch. 333.

RESCUE.—ESCAPE.—PRISON BREACH.

§ 159. These are analogous offences under the general category of hindrances to public justice. Few cases at common law have occurred in this country, the several offences being generally matter of statutory regulation.

§ 160. **Rescue** is "the forcibly and knowingly freeing another from an arrest or imprisonment."¹ If, therefore, the rescuer supposes the imprisonment to be in the hands of a private person, and not of an officer, he is not guilty, as the imprisonment must be a lawful one.² It is essential that the deliverance should be complete, otherwise the offence may be an attempt merely.³

§ 161. **Escape** is the going away without force out of his place of lawful confinement by the prisoner himself, or the negligent or voluntary permission by the officer having custody of such going away.⁴ The escape must be from a lawful confinement. -And if the arrest be by a private person without warrant, though legal, yet if the custody, without bringing the party before a magistrate, be prolonged for an unreasonable period, the escape will be no offence; and although it seems to have been held, in this country, that, after an arrest voluntarily made by a private person without warrant, he may let the prisoner go without incurring guilt, by the common law⁵ such private person will be guilty if he do not deliver over the arrested party to the proper officer.⁶ If the warrant on which the arrest is made be void, neither the prisoner nor the officer is liable for an escape.⁷

§ 162. **Prison Breach** is the forcible breaking and going away out of his place of lawful confinement by the prisoner.

¹ 4 Bl. Com. 131.

² *S. v. Hilton*, 26 Mo. 199.

³ *S. v. Murray*, 15 Me. 100.

⁴ *Nall v. S.*, 34 Ala. 262; *S. v. Doud*, 7 Conn. 384, M. 32; *Riley v. S.*, 16 Conn. 47; *C. v. Sheriff*, 1 Grant (Pa.), 187; *Luckey v. S.*, 14 Tex. 400.

⁵ *Habersham v. S.*, 56 Ga. 61.

⁶ 2 Hawk. P. C., c. 20, §§ 1-6.

⁷ *S. v. Leach* 7 Conn. 452; *Housh v. P.*, 75 Ill. 487; *Hitchcock v. Baker*, 2 Allen (Mass.), 431; *C. v. Crotty*, 10 Allen (Mass.), 403.

It is distinguished from escape by the fact that there must be a breaking of the prison. There must also be an exit,¹ in order to constitute the offence. The imprisonment must be lawful, but it is immaterial whether the prisoner be guilty or innocent.²

A prison is any place where a person is lawfully confined, whether it be in the stocks, in the street, or in a public or private house. Imprisonment is but a restraint of liberty.³

At common law, the punishment of the several offences was the same as would have been inflicted upon the escaped or rescued prisoner.⁴ It is now, however, generally a subject of special statute regulation.

¹ 2 Hawk. P. C., c. 18, § 12.

² *Reg. v Waters*, 12 Cox C. C. 390; *Habersham v. S.*, 56 Ga. 61; *C. v. Miller*, 2 Ash. (Pa.) 61. Upon the general subject see 2 Hawk. P. C. c. 18-21; 1 Gab. Cr. Law, 305 et seq.

³ 2 Hawk. P. C., c. 18, § 4.

⁴ 2 Hawk. P. C., c. 19, § 22; *C. v. Miller*, 2 Ash. (Pa.) 61.

CHAPTER IV.

OFFENCES AGAINST THE PUBLIC TRANQUILLITY, HEALTH,
AND ECONOMY.

§ 164. Affray.		§ 177. Engrossing. — Forestalling. —
165. Riot. — Rout. — Unlawful As-		Regrating.
sembly.		178. Nuisance.
167. Forcible Entry and Detainer.		183. Attempt.
171. Eavesdropping.		186. Conspiracy.
172. Libel and Slander.		

§ 163. All offences against the public peace are criminal, as has been seen ;¹ but the law protects not only the physical peace of the public, but also the established order and economy of the government. As part of this established order, the public trade seems to some extent to be protected ; at least, against such combinations and conspiracies as individuals cannot protect themselves against.

Attempts and conspiracies are crimes of this class, being acts prejudicial to the general well-being of the State.

AFFRAY.

§ 164. **An Affray** is the fighting, by mutual consent, of two or more persons in some public place, to the terror of the people.² The meaning of the word is, that which frightens ; and the offence consists in disturbing the public peace by bringing on a state of fear by means of such fighting, or such threats of fighting as are calculated to excite such fear, whether there be actual fear or not being immaterial. A mere friendly scuffle³ or a mere wordy dispute, therefore, without actual or threatened violence by one party or the other, does not amount

¹ *Ante*, § 14.

² *Wilson v. S.*, 3 Heisk. (Tenn.) 278; *Simpson v. S.*, 5 Yerg. (Tenn.) 356; 4 Bl. Com. 146.

³ *S. v. Freeman*, 127 N. C. 544, 37 S. E. 206.

to an affray.¹ But if actual or threatened violence is resorted to by one who is provoked thereto by the words of the other, this will make the latter guilty, even though he does not strike back.² It is sometimes held that consent is not essential.³ But it is obvious that one who is assaulted, and merely uses such force as is necessary to beat off his assailant, is guilty of no offence. He is not fighting, in the sense of the definition, but is merely exercising his right of self-defence.⁴

The place must be a public one. A field, therefore, surrounded by a dense wood, a mile away from any highway or other public place, does not lose its private character by the casual presence of three persons, two of whom engage in a fight.⁵ An enclosed lot, however, in full view of the public street of a village, thirty yards distant,⁶ is a public place, though a highway itself is not necessarily a public place, because by disuse, or the undergrowth of trees, or otherwise, it may have become concealed from public view.⁷ A fight begun in private, and continued till a public place is reached, becomes an affray.⁸

By the definition, it requires two to make an affray. If, therefore, one of two indicted persons be acquitted the case fails as to the other.⁹

RIOT. — ROUT. — UNLAWFUL ASSEMBLY.

§ 165. A Riot is a tumultuous disturbance of the peace, by three or more persons assembling together of their own au-

¹ *Hawkins v. S.*, 13 Ga. 322; *S. v. Downing*, 74 N. C. 181; *S. v. Sumner*, 5 Strobl. (S. C.) 53.

² *Hawkins v. S.*, *ante*; *Blackwell v. S.*, 119 Ga. 314, 46 S. E. 432; *S. v. Downing*, *ante*; *S. v. Perry*, 5 Jones (N.C.), 9; *S. v. Fanning*, 94 N. C. 910; *S. v. Sumner*, *ante*. But see, *contra*, *O'Neill v. S.*, 16 Ala. 65.

³ *Cash v. S.*, 2 Overt. (Tenn.) 198.

⁴ See also *Klum v. S.*, 1 Blackf. (Ind.) 377.

⁵ *Taylor v. S.*, 22 Ala. 15. Compare *S. v. Fritz*, 133 N. C. 725, 45 S. E. 957. See also *S. v. Heflin*, 8 Humph. (Tenn.) 84.

⁶ *Carwile v. S.*, 35 Ala. 392. Compare *Gamble v. S.*, 113 Ga. 701, 39 S. E. 301.

⁷ *S. v. Weekly*, 29 Ind. 206.

⁸ *Wilson v. S.*, 3 Heisk. (Tenn.) 278.

⁹ *Hawkins v. S.*, 13 Ga. 322. See also § 165.

thority, with an intent to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act itself be lawful or unlawful.¹

A **Rout** is a similar meeting upon a purpose which, if executed, would make them rioters, and which they actually make a motion to execute. It is an attempt to commit a riot.²

An **Unlawful Assembly** is a mere assembly of persons upon a purpose which, if executed, would make them rioters, but which they do not execute, or make any motion to execute.³

A like assembly for a public purpose, as where it is the intent of a riotous assembly to prevent the execution of a law by force, or to release all prisoners in the public jail, is treason.⁴

It has been held that an unlawful assembly, armed with dangerous weapons, and threatening injury, to the terror of the people, amounts to a riot, even before it proceeds to the use of force.⁵

Two persons, it has also been held, with a third aiding and abetting, may make a riot.⁶

That the assembly is in its origin and beginning a lawful one is immaterial, if it degenerate, as it may, into an unlawful and riotous one.⁷

§ 166. **The Violence Necessary** to constitute a riot need not be actually inflicted upon any person. Threatening with

¹ 1 Hawk. P. C., 8th ed., 513, § 1; *S. v. Russell*, 45 N. H. 83.

² *S. v. Sumner*, 2 Speers (S. C.), 599.

³ 1 Hawk. P. C., 8th ed., 513-516, §§ 1, 8, 9; 4 Bl. Com. 146; *Rex v. Birt*, 5 C. & P. 154, K. 387; *Reg. v. Vincent*, 9 C. & P. 91, K. 391; *Bankus v. S.*, 4 Ind 114.

⁴ 4 Bl. Com. 147; *Judge King's Charge*, 4 Pa. L. J. 29.

⁵ *C. v. Hershberger*, Lewis Cr. L. (Pa.) 72; *S. v. Brazil*, Rice (S. C.), 257.

⁶ *S. v. Straw*, 33 Me. 554.

⁷ *Reg. v. Soley*, 2 Salk. 594; *S. v. Snow*, 18 Me. 346; *Judge King's Charge*, 4 Pa. L. J. 31; *S. v. Brooks*, 1 Hill (S. C.), 361; 1 Hawk. P. C., 8th ed., 511, § 3. But see *S. v. Stalcup*, 1 Ired. (N. C.) 30.

pistols, or clubs, or even by words or gestures, to injure if interfered with in the prosecution of the unlawful purpose, or any other demonstration calculated to strike terror and disturb the public peace, is a sufficient violence to constitute the assembly riotous;¹ thus a tumultuous and threatening assemblage which without any specific act of violence prevents a sheriff from removing a prisoner to another jail, is a riot.² So where several attempt by threats and menaces to rescue a lawful prisoner, they are guilty of a riot.³ Indeed, it has been held that a trespass to property in the presence of a person in actual possession, though there is no actual force, amounts to a riot.⁴ The disturbance of the peace by exciting terror, is the gist of the offence.⁵ Hence it is immaterial whether the act sought to be performed is one that is in itself lawful or unlawful.⁶ To disturb another in the enjoyment of his lawful right is a trespass, which, if done by three or more persons unlawfully combined, with noise and tumult, is a riot: as the disturbance of a public meeting,⁷ or making a great noise and disturbance at a theatre for the purpose of breaking up the performance, though without offering personal violence to any one;⁸ or even going in the night upon a man's premises and shaving his horse's tail, if it be done with so much noise and in such manner as to rouse the proprietor and alarm his family.⁹

Violent threatening, and forcible methods of enforcing rights, whether public or private, are not lawful.¹⁰

¹ *Rex v. Hughes*, 4 C. & P. 373; *Bell v. Mallory*, 61 Ill. 167; *S. v. Calder*, 2 McCord (S. C.), 462; *S. v. Jackson*, 1 Speer (S. C.), 13.

² *Green v. S.*, 109 Ga. 536, 35 S. E. 97.

³ *Fisher v. S.*, 78 Ga. 253.

⁴ *S. v. Fisher*, 1 Dev. (N. C.) 504.

⁵ *S. v. Renton*, 15 N. H. 169; *S. v. Brooks*, 1 Hill (S. C.), 361.

⁶ *Kiphart v. S.*, 42 Ind. 273; *S. v. Boies*, 34 Me. 235; *S. v. York*, 70

N. C. 66.

⁷ *S. v. Townsend*, 2 Harr. (Del.) 543; *C. v. Runnels*, 10 Mass. 518; *S. v. Brazil*, Rice (S. C.), 257; *Judge King's Charge*, 4 Pa. L. J. 29, 38.

⁸ *Clifford v. Brandon*, 2 Camp. 358; *S. v. Brazil*, *ante*.

⁹ *S. v. Alexander*, 7 Rich. (S. C.) 5.

¹⁰ *Judge King's Charge*, 4 Pa. L. J. 29, 31.

FORCIBLE ENTRY AND DETAINER.

§ 167. This, though not strictly a common law offence, was made so at an early date by statute in England; and is now in many of the States, by adoption, a part of their common law. It consists in "violently taking or keeping possession of lands and tenements, with menaces, force and arms, and without the authority of law."¹

§ 168. **Force and Violence.** — The entry or detainer must, in order to constitute an indictable offence, be with such force and violence, or demonstration of force and violence, threatening a breach of the peace or bodily harm, and calculated to inspire fear, and to prevent those who have the right of possession from asserting or maintaining their right, as to become a matter of public concern in contradistinction to a mere private trespass.² Such force as will tend to a breach of the peace may not be used,³ but only such force is permissible as would sustain a plea in justification of *molliter manus imposuit*.⁴ That degree of force which the law allows a man to use in defence of his lawful possession, it does not allow him to use in recovering property of which he has been dispossessed, if it be tumultuous or riotous, or tends to a breach of the peace. It does not allow a breach of the peace to regain possession of property, or in redress of private wrongs.⁵ Like circumstances accompanying the wrongful de-

¹ 4 Bl. Com. 148.

² *Rex v. Wilson*, 8 T. R. 357, C. 471; *Harding's Case*, 1 Greenlf. (Me.) 22, C. 472; *Benedict v. Hart*, 1 Cush. (Mass.) 487; *C. v. Shattuck*, 4 Cush. (Mass.) 141; *S. v. Pearson*, 2 N. H. 550; *Wood v. Phillips*, 43 N. Y. 152; *C. v. Keeper, &c.*, 1 Ashm. (Pa.) 140; *S. v. Cargill*, 2 Brev. (S. C.) 445; 1 Hawk. P. C., c. 28, § 27.

³ But the mere force implied in the trespass is not enough; and an indictment which has only an allegation that the defendant broke and entered "*vi et armis*" is not sufficient: *Rex v. Blake*, 3 Burr. 1731, C. 473; *C. v. Taylor*, 5 Binney (Pa.), 277, M. 44.

⁴ *Fifty Associates v. Howland*, 5 Cush. (Mass.) 214.

⁵ *Gregory v. Hill*, 8 T. R. 299; *Sampson v. Henry*, 11 Pick. (Mass.) 379; *Hyatt v. Wood*, 3 Johns. (N. Y.) 239; *Davis v. Whitridge*, 2 Strobb. (S. C.) 232; 3 Bl. Com. 4.

tention of the possession of real property will constitute a forcible detainer.¹

It is immaterial how the intimidation is produced, whether by one or many, by actual force or by threats, or by tumultuous assemblies, or by weapons, or in whatever way it may be produced, provided it actually occurs, or might reasonably be expected to occur, if the parties entitled to possession should be present and in a position to be affected by it. Hence it is not necessary to show that the person in possession was actually expelled by force if the display was such as to deter him from offering resistance.² But his fear must be a reasonable one.³ And entry and detainer by such demonstrations of force and violence are equally indictable, although no one be actually present and in possession of the premises entered to be intimidated thereby.⁴

Nor need the display of force be upon the actual premises; for if the owner be seized and kept away, for the purpose of thwarting his resistance, and an entry be then made during such enforced absence, though peaceably, it will amount to a forcible entry and detainer.⁵ And a peaceable entry followed by a forcible expulsion of the owner will also constitute the offence.⁶ The threats of violence must be personal. No threats of injury to property will be sufficient.⁷ A peaceable entry and detainer even though by trick is not criminal.⁸

§ 169. **What May Be Entered upon or Detained.** — Peaceable occupancy, without reference to title, is the possession which the law says shall not be taken away or detained by force.⁹

¹ 1 Hawk. P. C., 8th ed., c. 28, § 30; *C. v. Dudley*, 10 Mass. 403; *P. v. Rickert*, 8 Cow. (N. Y.) 226.

² *Williams v. S.*, 120 Ga. 488, 48 S. E. 149.

³ *S. v. Mills*, 104 N. C. 905, 10 S. E. 676.

⁴ *P. v. Field*, 52 Barb. (N. Y.) 198; 1 Hawk. P. C., 8th ed., c. 28, §§ 26, 29.

⁵ *Ibid.*

⁶ 3 Bac. Abr., For. Entry (B).

⁷ 1 Hawk. P. C., 8th ed., c. 28, § 28.

⁸ See *C. v. Shindell*, 9 Pa. Dist. R. 298; *S. v. Leary*, 136 N. C. 578, 48 S. E. 570.

⁹ *Rex v. Wilson*, 8 T. R. 357; *Peelle v. S.*, 161 Ind. 378, 68 N. E. 682;

And this possession may be constructive as well as actual; as where the owner of a building, which he does not personally occupy, but rents to tenants, while waiting for a new tenant, is forcibly kept out by a stranger and trespasser.¹ Mere custody, however, is not enough. Therefore, if a servant withholds possession against his employer, the latter is not guilty of the offence in asserting his right to the possession which is already his, and which the servant has not.² So if the owner has gained peaceable possession of the main house, this carries with it the possession of the whole; and he is not liable under the law for the forcible entry of a shed adjoining, in which a tenant had intrenched himself.³

One cotenant may be guilty of the offence as against another who is in peaceable possession and resists;⁴ and so may a wife as against her husband.⁵

§ 170. **Personal Property. Forcible Trespass.** — These rules and principles are strictly applicable only to the forcible entry and detention of real property; and it has been said that the forcible detainer of personal property is not indictable.⁶ But the seizure of personal property under like circumstances, and with similar demonstrations, may be indicted as a forcible trespass.⁷ And there seems to be no reason why its forcible detention may not be also indictable by an analogous change in the description of the offence. It is not less a public injury. It has been suggested that the offence can only be committed when the party trespassed upon is present;⁸ but upon principle as well as upon authority the reverse seems to be the better law.⁹

Beauchamp v. Morris, 4 Bibb (Ky.), 312; *C. v. Bigelow*, 3 Pick. (Mass.) 31; *S. v. Pearson*, 2 N. H. 550; *P. v. Leonard*, 11 Johns. (N. Y.) 504.

¹ *P. v. Field*, 52 Barb. (N. Y.) 198.

² *S. v. Curtis*, 4 Dev. & Bat. (N. C.) 222; *S. v. Leary*, 136 N. C. 578, 48 S. E. 570; *C. v. Keeper, &c.*, 1 Ashm. (Pa.) 140.

³ *S. v. Pridgen*, 8 Ired. (N. C.) 64.

⁴ *Reg. v. Marrow*, Cas. temp. Hardw. 174.

⁵ *Rex v. Smyth*, 1 M. & R. 155.

⁶ *S. v. Marsh*, 64 N. C. 378.

⁷ *S. v. Ray*, 10 Ired. (N. C.) 39; *S. v. Widenhouse*, 71 N. C. 279.

⁸ *S. v. McAdden*, 71 N. C. 207.

⁹ *Ante*, § 168; *S. v. Thompson*, 2 Overton (Tenn.), 96.

EAVESDROPPING.

§ 171. **Eavesdropping** is a kind of nuisance which was punishable at common law, and was defined to be a listening under the eaves or windows of a house for the purpose of hearing what may be said, and thereupon to form slanderous and mischievous tales, to the common nuisance.¹ The offence is no doubt one at common law in this country. It has, indeed, been expressly so held;² and it would seem that any clandestine listening to what may be said in a meeting of the grand jury, for instance, required by law to be secret, or perhaps any meeting which may lawfully be held in secret, with an intent to violate that secrecy, to the public injury or common nuisance,³ would constitute the offence.

LIBEL AND SLANDER.

§ 172. **Definition.** — A general and comprehensive definition of libel is that of Lord Camden, cited by Hamilton in the argument in the case of *The People v. Croswell*,⁴ which has been repeatedly approved by the courts of New York, and is as follows: "A censorious or ridiculing writing, picture, or sign, made with a mischievous or malicious intent, toward government, magistrates, or individuals."⁵

Within the scope of this definition, printed and published blasphemy is also indictable as a libel,⁶ and so is printed obscenity or other immoral matter, — both on the ground that they tend to deprave or corrupt the public morals.⁷ So is a publication against the government, tending to degrade and vilify it, and to promote discontent and insurrection;⁸ or

¹ 1 Hawk. P. C., Table of Matters to Vol. I. Eavesdropper.

² *S. v. Williams*, 2 Overton (Tenn.), 103.

³ *C. v. Lovett*, 6 Pa. L. J. Rep. 226; *S. v. Pennington*, 3 Head (Tenn.), 299.

⁴ 3 Johns. Cas. 351.

⁵ *Cooper v. Greeley*, 1 Denio (N. Y.), 347.

⁶ *C. v. Kneeland*, 20 Pick. (Mass.) 211; *P. v. Ruggles*, 8 Johns. (N. Y.) 290; *post*, § 194.

⁷ *C. v. Holmes*, 17 Mass. 336; *C. v. Sharpless*, 2 S. & R. (Pa.) 91.

⁸ *Resp. v. Dennie*, 4 Yeates (Pa.), 267.

calumniating a court of justice, tending to weaken the administration of justice.¹ So libels upon distinguished official foreign personages have repeatedly been held in England punishable at the common law, as tending to disturb friendly international relations.² It remains to be seen whether the State courts (the United States courts having no jurisdiction) will in this country follow such a precedent.

But the more common and restricted definition of libel at common law, as against individuals, is, the malicious publication of any writing, sign, picture, effigy, or other representation tending to defame the memory of one who is dead, or the reputation of one who is living, and to expose him to ridicule, hatred, or contempt. It is punishable as a misdemeanor, on the ground that such a publication has a tendency to disturb the public peace.³ The libel is equally criminal if directed against a family, though it is not against any individual member of it.⁴

Words that would not be actionable as slanderous may nevertheless, if written and published, be indictable as libellous. Written slander is necessarily premeditated, and shows design. It is more permanent in its effect, and calculated to do much greater injury, and "contains more malice."⁵ Thus, it is libellous to write and publish of a juror that he has misbehaved, as such, by staking the verdict upon a chance;⁶ or of a stage-driver, that he has been guilty of gross misconduct and insult towards his passengers;⁷ or that a bishop has attempted to convert others to his religious views by bribes;⁸

¹ *Rex v. Watson*, 2 T. R. 199.

² *Rex v. D'Eon*, 1 W. Bl. 510; *Peltier's Case*, 28 Howell St. Tr. 529.

³ 1 Hawk. P. C., 8th ed., 542, § 3; *S. v. Avery*, 7 Conn. 266; *Giles v. S.*, 6 Ga. 276; *C. v. Clap*, 4 Mass. 163, C. 524; *P. v. Croswell*, 3 Johns. Cas. (N. Y.) 337; *Cooper v. Greeley*, 1 Denio (N. Y.), 347; *S. v. Henderson*, 1 Rich. (S. C.) 179.

⁴ *S. v. Brady*, 44 Kan. 435, 24 P. 948.

⁵ *King v. Lake*, Hardr. 470.

⁶ *C. v. Wright*, 1 Cush. (Mass.) 46.

⁷ *Clement v. Chivis*, 9 B. & C. 172.

⁸ *Archbishop of Tuam v. Robeson*, 5 Bing. 17.

or that a man is a "rascal";¹ or that "he is thought no more of than a horse-thief";² or to charge a lawyer with divulging the secrets of his client;³ or to say of a member of a convention to frame a constitution, that he contended in the convention that government had no more right to provide for worship of the Supreme Being than of the devil;⁴ or to print of a man that he did not dare to bring an action in a certain county, "because he was known there."⁵ And it has even been held that it is libellous to charge a man with a gross want of feeling or discretion.⁶ It is a criminal libel to write an indecent proposal to a woman.⁷ If a portrait-painter paints the ears of an ass to a likeness he has taken, and exposes it to the public, this is a libel.⁸ So is it to say of an historian that he disregards justice and propriety, and is insensible to his obligations as an historian.⁹ So it is libellous to publish a correct account of judicial proceedings, if accompanied with comments and insinuations tending to asperse a man's character;¹⁰ or for an attorney to introduce such matter into his pleadings.¹¹ So to say of a candidate for office that he would betray his trust from motives of political aggrandizement, or to accomplish some sinister or dishonest purpose, or to gratify his private malice, is a libel; but it is not a libel to publish the truth concerning his character and qualifications for the office he aspires to, with a view to inform the electors.¹²

¹ *Williams v. Karnes*, 4 *Humph.* (Tenn.) 9.

² *Nelson v. Musgrave*, 10 *Mo.* 648.

³ *Riggs v. Denniston*, 3 *Johns. Cas.* (N. Y.) 198.

⁴ *Stow v. Converse*, 3 *Conn.* 325.

⁵ *Steele v. Southwick*, 9 *Johns.* (N. Y.) 214.

⁶ *Weaver v. Lloyd*, 2 *B. & C.* 678; *S. v. Keenan*, 111 *Ia.* 286, 82 *N. W.* 792; *S. v. Atkins*, 42 *Vt.* 252. See also *Barthelemy v. P.*, 2 *Hill* (N. Y.), 248.

⁷ *Reg. v. Adams*, 22 *Q. B. D.* 66.

⁸ *Mezzara's Case*, 2 *City Hall Rec.* 113.

⁹ *Cooper v. Stone*, 24 *Wend.* (N. Y.) 434.

¹⁰ *Thomas v. Croswell*, 7 *Johns.* (N. Y.) 264.

¹¹ *C. v. Culver*, 2 *Pa. Law Jour.* 359; *King v. McKissick*, 126 *Fed.* 215.

¹² *C. v. Clap*, 4 *Mass.* 163, *C.* 524; *S. v. Burnham*, 9 *N. H.* 34; *Powers v. Dubois*, 17 *Wend.* (N. Y.) 63; *C. v. Odell*, 3 *Pitts. (Pa.)* 449; *Wilson v. Noonan*, 23 *Wis.* 105.

The form of expression in charging is immaterial,¹ whether interrogative or direct, or by innuendo, or ironical, or allegorical, or by caricature, or by any other device whatever. The question always is, what is the meaning and intent of the author, and how will it be understood by people generally.²

§ 173. **Malicious.** — To constitute a malicious publication it is not necessary that the party publishing be actuated by a feeling of personal hatred or ill-will towards the person defamed, or even that it be done in the pursuit of any general evil purpose or design, as in the case of malicious mischief.³ It is sufficient if the act be done wilfully, unlawfully, and in violation of the just rights of another, according to what, as we have seen,⁴ is the general definition of legal malice. And malice is presumed as matter of law by the proof of publication.⁵ Under modern statutes, and, in some cases, constitutional provisions, however, the whole question of law and fact, i. e., whether the matter published was illegal and libellous, and whether it was malicious or not, as well as whether it was written or published by the defendant, is left to the jury, they having in such cases greater rights than in other criminal prosecutions.⁶

It is not essential that the charge should be false or scandalous: it is enough if it be malicious. Indeed, the old maxim of the common law was, "The greater the truth, the greater the libel," on the ground that thereby the danger of disturbance of the public peace was greater. The truth, therefore, is no

¹ Thus a wax-works exhibit may be libellous; *Monson v. Tussauds Ltd.* [1894] 1 Q. B. 671, K. 434.

² *Rex v. Lambert*, 2 Camp. 398; *Gathercole's Case*, 2 Lewin, 237; *Hoare v. Silverlock*, 12 Q. B. 625, C. 517; *Reg. v. Munslow*, [1895] 1 Q. B. 758, K. 432; *S. v. Chace*, Walk. (Miss.) 384.

³ See *post*, § 322; *Kubrecht v. S.* (Tex.), 69 S. W. 157.

⁴ *Ante*, § 33.

⁵ *Rex v. Harvey*, 2 B. & C. 257, C. 511; *Layton v. Harris*, 3 Harr. (Del.) 406; *C. v. Snelling*, 15 Pick. (Mass.) 321; *Root v. King*, 7 Cow. (N. Y.) 613; *C. v. Sanderson*, 3 Pa. Law Jour. 269; *Smith v. S.*, 32 Tex. 594.

⁶ *S. v. Goold*, 62 Me. 509; *S. v. Lehre*, 2 Brev. (S. C.) 446; 2 Greenl. Ev., § 411.

justification by the common law. But this rule has in some cases, in this country, been so far modified as to permit the defendant to show, if he can, that the publication under the circumstances was justifiable and from good motives, and then show its truth, in order to negative the malice and intent to defame.¹ And statutes in most if not all of the States now admit the truth in defence if the matter be published for a justifiable end and with good motives, and give the jury the right to determine these facts, as well as whether the publication be a libel or not.²

§ 174. **Publication.** — Placing a libel where it may be seen and understood by one or more persons other than the maker, is a publication, for the purposes of the criminal law, without reference to the question whether in fact it is seen or not,³ or if seen whether or not it is understood.⁴ It has been held that to send a libellous letter to the person libelled is a sufficient publication.⁵ But it may be doubted, in the absence of statutory provision to that effect, if the mere delivery of a letter containing libellous matter to the libelled party is a technical publication, though doubtless the sending of such a letter is an indictable offence, as tending to a breach of the peace.⁶ But there can be no doubt that a sealed letter addressed and delivered to the wife, containing aspersions upon her husband's character, is a publication.⁷

¹ *Reg. v. Newman*, 1 E. & B. 268, 558, K. 438; *C. v. Clap*, 4 Mass. 163, C. 524; *C. v. Blanding*, 3 Pick. (Mass.) 304, M. 954; *Barthelemy v. P.*, 2 Hill (N. Y.), 248. See also *Codd's Case*, 2 City Hall Rec. (N. Y.) 171; *S. v. Lehre*, 2 Brev. (S. C.) 446; *C. v. Morris*, 1 Va. Cas. 176.

² *Riley v. S.*, 132 Ala. 13, 31 So. 731; *C. v. Bonner*, 9 Met. (Mass.) 410; *S. v. White*, 7 Ire. (N. C.) 180; *S. v. Brock*, 61 S. C. 141, 39 S. E. 359. Compare *S. v. Haskins*, 109 Ia. 656, 80 N. W. 1063.

³ *Rex v. Burdett*, 4 B. & Ald. 95, 126; *Whitfield v. S. E. Ry. Co.*, E. B. & E. 115; *Giles v. S.*, 6 Ga. 276, M. 952.

⁴ *Reg. v. Brooke*, 7 Cox C. C. 251, C. 526; *Haase v. S.*, 53 N. J. L. 34, 20 Atl. 751; *Mankins v. S.*, 41 Tex. Cr. R. 662, 57 S. W. 950.

⁵ *S. v. Avery*, 7 Conn. 266.

⁶ *McIntosh v. Matherly*, 9 B. Mon. (Ky.) 119; *Sheffill v. Van Deusen*, 13 Gray (Mass.) 304; *Lyle v. Clason*, 1 Caines (N. Y.), 581; *Fonville v. McNease*, Dudley (S. C.), 303; *Hodges v. S.*, 5 Humph. (Tenn.) 112.

⁷ *Wenman v. Ash*, 13 C. B. 836; *Schenck v. Schenck*, 1 Spencer (N. J.), 208.

§ 175. **Privileged Communications.** — Certain publications are privileged, that is to say, are *prima facie* permissible and lawful. If the occasion and circumstances under which they are made rebut the inference of malice drawn from its libellous character, the publications are privileged and lawful, unless the complainant shows that the defendant was actuated by improper motives. But no one can intentionally injure under cover of a privileged communication; and if he avail himself of this course he is chargeable, although the matter published be true and privileged.¹ Thus, a fair and candid criticism, though severe, of a literary work, exposing its demerits, is privileged; but if the criticism is made the vehicle of personal calumny against the author aside from the legitimate purpose of criticism, it becomes libellous.² A communication made in good faith by a person in the discharge of some private duty, legal or moral, or in the conduct of his own affairs, and in matters wherein he is interested, is privileged.³ Therefore, one may write to a relation warning her not to marry a certain person; ⁴ or complain to a superior against an inferior officer in order to obtain redress; ⁵ or give the character of a servant in answer to a proper inquiry; ⁶ or report a servant's conduct to his master; ⁷ or tell the truth to defend his own character and interests; ⁸ or to enforce the rules of a society; ⁹ or to

¹ *Wright v. Woodgate*, 2 C., M. & R. 573; *Central Ry. Co. v. Sheftall*, 118 Ga. 865, 45 S. E. 687; *S. v. Keenan*, 111 Ia. 286, 82 N. W. 792; *C. v. Blanding*, 3 Pick. (Mass.) 304, M. 951; *McArthur v. S.*, 41 Tex. Cr. Rep. 635, 57 S. W. 847. On criticism of public officers see 23 Am. Law Review, 346.

² *Carr v. Hood*, 1 Camp. 355.

³ *Toogood v. Spyring*, 4 Tyrw. 582; *Bodwell v. Osgood*, 3 Pick. (Mass.) 379.

⁴ *Todd v. Hawkins*, 8 C. & P. 88.

⁵ *Fairman v. Ives*, 5 B. & Ald. 642.

⁶ *Child v. Affleck*, 9 B. & C. 403.

⁷ *Cockayne v. Hodgkisson*, 5 C. & P. 543.

⁸ *Coward v. Wellington*, 7 C. & P. 531.

⁹ *Remington v. Congdon*, 2 Pick. (Mass.) 310; *Streety v. Wood*, 15 Barb. (N. Y.) 105.

aid in the exposure or detection of crime, or protect the public or a friend from being swindled or otherwise injured.¹ These communications and the like, though they may be to some extent false, are all privileged if made without malice, and for justifiable ends. Though a man is protected in making a libellous speech in a legislative assembly, if he publish it he is guilty of libel.² And fair reports of judicial and other proceedings, as matter of news, will be privileged, while if unfair, or interlarded with malicious comment, they will be punishable as libellous.³ If, however, the matter published is in itself indecent, blasphemous, or contrary to good morals, it has been held, upon very careful consideration, to be indictable.⁴

§ 176. **Slander.**—No instance has been found of an indictment for mere verbal slander against an individual in this country, nor is it indictable in England, unless the individual sustained such a relation to the public, or the slander was of such a character, as to involve something more than a private injury, as where one was held indictable for calling a grand jury as a body a set of perjured rogues.⁵ In many States the rule has been changed by statute so as to make certain slanders criminal offences.

ENGROSSING. — FORESTALLING. — REGRATING.

§ 177. These were severally offences at the common law, and describe different methods of speculation and artificial enhancement or depression of the prices of merchandise, by resort to false news, extraordinary combinations, and other indirect means outside of the regular action of the laws of trade. They were based upon early English statutes, and notably 5 and 6 Edward VI, c. 14, which are cited by Haw-

¹ *Lay v. Lawson*, 4 A. & E. 795; *C. v. Blanding*, 3 Pick. (Mass.) 304.

² *Rex v. Abington*, 1 Esp. 225, K. 440; *Rex v. Creevey*, 1 M. & S. 273.

³ *Lewis v. Walter*, 4 B. & Ald. 605; *Curry v. Walter*, 1 B. & P. 525, *Clark v. Binney*, 2 Pick. (Mass.) 113; *Thomas v. Croswell*, 7 Johns. (N. Y.) 264.

⁴ *Rex v. Carlile*, 3 B. & Ald. 161.

⁵ *Reg. v. Langley*, 6 Mod. 125, K. 437; *Rex v. Spiller*, 2 Show. 207. See also 2 Bish. Cr. Law, 7th ed., §§ 945 et seq.

kins,¹ and of which a very good summary may be found in Bishop.² These statutes are now repealed in England, and the offences abolished. They were undoubtedly a part of the common law brought to this country, but seem, nevertheless, not to have been enforced, — perhaps on account of the greater freedom of trade, and the infrequency of the occurrence of the evils connected with them in a new country. There is no reason in principle, however, why they should not be applicable to many of the practices of the stock and other markets of the present day.³

NUISANCE.

§ 178. **A Nuisance** is anything that works hurt, inconvenience, or damage. If to the public, as the obstruction of a highway or the pollution of the atmosphere, it is a common nuisance, and punishable by indictment at common law. If the hurt is only to a private person or interest, the remedy is by civil proceedings.⁴ And that is hurtful which substantially interferes with the free exercise of a public right, which shocks or corrupts the public morals, or injures the public health. And the hurt may be wrought as well by acts of omission as by acts of commission; as by failing to repair a road, or to entertain a stranger at an inn, both being regarded as disorderly acts.⁵

§ 179. **Obstruction and Pollution.**⁶ — Certain acts are said to be nuisances *per se*, because they are in violation of the public right. Thus, an obstruction in a street is a nuisance, because it may interfere with public travel, although it does not affir-

¹ 1 Hawk. P. C., 8th ed., 646.

² 1 Cr. Law, 7th ed., §§ 518 et seq.

³ *City of Louisville v. Roupe*, 6 B. Mon. (Ky.) 591; 7 Dane Abr. 39. For the learning on this subject, in addition to the authorities already cited, see *Rex v. Waddington*, 1 East, 143; *Rex v. Webb*, 14 East, 402; *Pratt v. Hutchinson*, 15 East, 511; *Rex v. Rusby*, Peake Add. Cas. 189; 2 Chitty Cr. Law, 52.

⁴ 3 Bl. Com. 216; 4 Bl. Com. 166; *S. v. Schlottman*, 52 Mo. 164.

⁵ 4 Bl. Com. 167; *S. v. Madison*, 63 Me. 546; *S. v. Morris Canal Co.*, 2 Zab. (N. J.) 537; *Hill v. S.*, 4 Sneed (Tenn.), 443.

⁶ *Ante*, § 14.

matively appear that it certainly has interfered with it, or even of it appears that there has been no travel to obstruct since the obstruction was erected.¹ So of the obstruction of navigable waters, although the inconvenience may be inappreciable.² So doing any act in the street or in a building adjoining the street (as giving an exhibition of pictures in a window,³ or other exhibition near the street,⁴ or holding an auction sale on the street,⁵ or erecting houses on a public square,⁶ or running an engine in the streets,⁷ or digging therein a hole,⁸ or discharging water so as to cover the sidewalk with ice,⁹ or delivering out merchandise or other material, as brewer's grain from a brewery), in such a manner as to cause the street to be constantly obstructed by men or vehicles, will amount to a nuisance.¹⁰ A mere transitory obstruction, however, resulting from the ordinary and proper use of a highway, as in the unloading of goods from a wagon, or the dumping of coal into a street to be removed to the house, if the obstruction be not permitted to remain more than a reasonable time, does not amount to a nuisance.¹¹ Trees in the street are not necessarily a nuisance.¹²

The pollution of a stream of water, by discharging into it offensive and unwholesome matter, if the water be used by the

¹ *Knox v. New York City*, 55 Barb. (N. Y.) 404, C. 543.

² *S. Merrit*, 35 Conn. 314 ; *Pascagoula Boom Co. v. Dickson*, 77 Miss. 587, 28 So. 724 ; *P. v. Vanderbilt*, 28 N. Y. 396 ; *Woodman v. Kilbourn Mfg. Co.*, 1 Abb. (U. S.) 158, Fed. Cas. No. 17,978. Compare *Reg. v. Stephens*, L. R. 1 Q. B. 702.

³ *Rex v. Carlile*, 6 C. & P. 636.

⁴ *Hall's Case*, 1 Vent. 169 ; *Walker v. Brewster*, L. R. 5 Eq. 25.

⁵ *C. v. Milliman*, 13 S. & R. (Pa.) 403.

⁶ *C. v. Rush*, 14 Pa. 186.

⁷ *C. v. Allen*, 148 Pa. 358, 23 Atl. 1115.

⁸ *Robinson v. Mills*, 25 Mont. 391, 65 P. 114.

⁹ *Leahan v. Cochran*, 178 Mass. 566, 60 N. E. 382.

¹⁰ *Rex v. Russell*, 6 East, 427 ; *P. v. Cunningham*, 1 Denio (N. Y.), 524. See also *Attorney General v. Williams*, 140 Mass. 329, 2 N. E. 80 ; *Beecher v. P.*, 38 Mich. 289 ; *Cohen v. New York*, 113 N. Y. 532, 21 N. E. 700 ; *Robinson v. B. & O. R. R.*, 129 Fed. 753.

¹¹ *Rex v. Carlile*, 6 C. & P. 636 ; *P. v. Cunningham*, *ante*.

¹² *Burget v. Greenfield*, 120 Ia. 432, 94 N. W. 933.

public, is also indictable as a nuisance,¹ and all who contribute to such pollution are guilty.² So is the damming up of a stream, so as to make the water stagnant and pestiferous.³ In New Hampshire, the prevention of the passage of fish by a dam constructed across a non-navigable stream is indictable at common law.⁴

§ 180. **Obnoxious Business.** — Other acts may or may not be nuisances, according to the attendant circumstances. A lawful business conducted in a proper manner, in a proper place, and at a proper time, without inconvenience to the public, may be perfectly innocent; while the same business, if carried on in an improper manner, or at an improper place, or at an improper time, to the annoyance or injury of the public, will become abatable as a nuisance. Manufacturing gunpowder, refining oils, tanning hides, and making bricks are examples of this class.⁵ So the setting of spring-guns;⁶ the maintenance of a pesthouse,⁷ slaughter-house,⁸ dump,⁹ or bowling alley.¹⁰ No act authorized by the legislature, however, can be punished as a nuisance, even though at common law a nuisance *per se*.¹¹ But this will not protect an act done in a manner unauthorized by the license,¹² or in excess thereof, as storing dynamite beyond the amount allowed,¹³ or prior to the giving of the license.¹⁴

¹ *S. v. Taylor*, 29 Ind. 517; *S. v. Buckman*, 8 N. H. 203.

² *S. v. Smith*, 82 Ia. 423, 48 N. W. 727.

³ *S. v. Rankin*, 3 S. C. 438.

⁴ *S. v. Franklin Falls Co.*, 49 N. H. 240.

⁵ *Anon.*, 12 Mod. 342; *Powder Co. v. Tearney*, 131 Ill. 322, 23 N. E. 389; *S. v. Hart*, 34 Me. 36; *Attorney General v. Steward*, 20 N. J. Eq. 415; *Wier's Appeal*, 74 Pa. St. 230.

⁶ *S. v. Moore*, 31 Conn. 479.

⁷ *Youngstown Trustees v. Youngstown*, 25 O. Cir. Ct. R. 518.

⁸ *Wilcox v. Henry*, 35 Wash. 591, 77 P. 1055.

⁹ *Percival v. Yousling*, 120 Ia. 451, 94 N. W. 913.

¹⁰ *Harrison v. P.*, 101 Ill. App. 224.

¹¹ *C. v. Boston*, 97 Mass. 555; *P. v. New York Gas Light Co.*, 64 Barb. (N. Y.) 55; *Danville, &c., R. R. v. C.*, 73 Pa. 29.

¹² *Rand Lumber Co. v. Burlington*, 122 Ia. 203, 97 N. W. 1096. Compare *S. v. Hartford St. Ry. Co.*, 76 Conn. 174, 56 Atl. 506.

¹³ *Ricker v. Shaler*, 89 App. Div. (N. Y.) 300, 85 N. Y. S. 825.

¹⁴ *C. v. Packard*, 185 Mass. 64, 69 N. E. 1067.

In the case of offensive odors, they become a nuisance if they make the enjoyment of a right, — as of a passage along the highway, or of life elsewhere, — uncomfortable, though the odors may not be unwholesome.¹ So a coal-shed in a thickly settled locality, which disturbs the neighborhood by reason of noise and dust, is a nuisance.²

§ 181. **Immoral Nuisances.** — Any business obnoxious to the public morals is a criminal nuisance. Such is the business of carrying on “bookmaking” in a booth on a race-course,³ or the singing of ribald songs on the public streets.⁴ So profanity, or profane cursing and swearing, is a special form of nuisance, indictable at common law.⁵ But it has been held that a single instance of swearing will not constitute the offence; there must be such repetition as to make the offence a common nuisance.⁶ Eavesdroppers, common scolds, railers and brawlers, common drunkards, common barrators, and the like, persons guilty of open obscenity of conduct or language, of blasphemy, or profanity, or who keep disorderly houses, as for gaming or prostitution, or make disorderly and immoral exhibitions, or promote lotteries, or carry about persons affected with contagious disease, or make unseemly noises at improper times and places, may all be included under the general category of common nuisances, if the several acts work injury to the public, punishable at common law unless otherwise provided for by statute.⁷

§ 182. **Prescription. Public Benefit.** — The lapse of time does not give the right to maintain a nuisance.⁸ No one can pre-

¹ *Rex v. White*, 2 C. & P. 485, n.; *Seacord v. P.*, 121 Ill. 623, 13 N. E. 194; *C. v. Perry*, 139 Mass. 198, 29 N. E. 656, C. 552; *S. v. Payson*, 37 Me. 361; *S. v. Purse*, 4 McCord (S. C.), 472.

² *Wylie v. Elwood*, 134 Ill. 281, 25 N. E. 570.

³ *McClellan v. S.*, 49 N. J. L. 471, 9 Atl. 681.

⁴ *S. v. Toole*, 106 N. C. 736, 11 S. E. 168.

⁵ *S. v. Powell*, 70 N. C. 67.

⁶ *S. v. Jones*, 9 Ired. (N. C.) 38; *S. v. Graham*, 3 Sneed (Tenn.), 131.

⁷ 4 Bl. Com. 167 et seq., and notes, Sharwood's ed.; *Rex v. Moore*, 3 B. & Ad. 184; *Barker v. C.*, 19 Pa. 412. See on all these kinds of nuisance, 1 Bish. New Cr. L., §§ 1082–1151.

⁸ *Reg. v. Reed*, 12 Cox C. C. 1; *Kelly v. Pittsburgh R. R.*, 28 Ind. App.

scribe against the State, against which the statute of limitations does not run, and which is not chargeable with laches. Nor is it any excuse that the public benefit is equal to the public inconvenience;¹ nor that similar nuisances have been tolerated.²

It has indeed been said by high authority that, where a useful trade or business has been established, away from population, it may be continued, notwithstanding the approach of population.³ So, too, it has been held that a business established in a neighborhood where offensive trades already exist, which, though individually offensive, does not materially add to the already existing nuisance, may be permitted.⁴ And in one case, at least, in this country the doctrine of the first case seems to have been accepted.⁵ But it is questionable whether this is now the law in England.⁶ And the very decided weight of authority in this country is to the contrary on both points.⁷

But an important qualification is to be noted. It is true that a business which is a nuisance cannot be defended by reason of lapse of time, or of the character of the surroundings; but in deciding whether in fact the business constitutes a nuisance, these facts are to be considered, along with the other circumstances of the case. What would be a nuisance

457, 63 N. E. 233; *Leahan v. Cochran*, 178 Mass. 566, 60 N. E. 382, 53 L. R. A. 891, with note and collection of cases on the point; *Isham v. Broderick*, 89 Minn. 397, 95 N. W. 224. See also *Mercer County v. City of Harrodsburg*, 24 Ky. L. R. 1651, 71 S. W. 928.

¹ *Seacord v. P.*, 121 Ill. 623, 13 N. E. 194; *S. v. Kaster*, 35 Ia. 221, C. 549; *Hart v. Albany*, 9 Wend. (N. Y.) 571; *Resp. v. Caldwell*, 1 Dall. (Pa.) 150.

² *Pittsburgh Ry. Co. v. Crothersville*, 159 Ind. 330, 64 N. E. 914; *C. v. Deerfield*, 6 All. (Mass.) 449; *C. v. Perry*, 139 Mass. 198, 29 N. E. 656; *P. v. Mallory*, 4 T. & C. (N. Y.) 567.

³ *Abbott, C. J.*, *Rex v. Cross*, 2 C. & P. 483.

⁴ *Rex v. Watts*, M. & M. 281.

⁵ *Ellis v. S.*, 7 Blackf. (Ind.) 534.

⁶ *Reg. v. Fairie*, 8 E. & B. 486.

⁷ *Ashbrook v. C.*, 1 Bush (Ky.), 139; *C. v. Upton*, 6 Gray (Mass.), 473; *P. v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735; *Taylor v. P.*, 6 Parker C. C. (N. Y.) 347; *P. v. Cunningham*, 1 Denio (N. Y.), 524; *C. v. Van Sickie*, 1 Bright (Pa.), 69; *Douglass v. S.*, 4 Wis. 387.

in a country village, or in the residential quarter of a city, might not be a nuisance if established in a locality devoted to manufacturing. Therefore a refinery or a slaughter-house is not a nuisance, if established in a locality which is devoted to such business, and draws its prosperity from it.¹

ATTEMPT.²

§ 183. **Attempt, Preparation, and Intent.** — An attempt to commit a crime is distinguishable from preparation to commit it, and also from the intent to commit. The purchase of matches, for instance, with the intent to set fire to a house at some convenient opportunity, is not an attempt to set the fire. It is mere preparation, and, though the intent exists, there is no step taken in the perpetration of any crime to which the intent can attach. The law does not punish the mere entertainment of a criminal intent. To bring the law into action it is necessary that some act should be done in pursuance of the intent, immediately and directly tending to the commission of the crime,—an act which, should the crime be perpetrated, would constitute part and parcel of the transaction, but which does not reach to the accomplishment of the original intent, because it is prevented, or voluntarily abandoned.³ What does immediately and directly so tend is to be determined by the circumstances of each particular case: and, as might be expected, courts which agree upon the principle are not entirely consistent in its application. The dividing line between acts preparatory to and in execution of a crime is very shadowy.⁴ If the act preparatory be unequivocal and explicable only upon the theory that

¹ *Ballentine v. Webb*, 84 Mich. 38, 47 N. W. 485; *C. v. Miller*, 139 Pa. 77, 21 Atl. 138, C. 555.

² On this general subject see an article by Professor J. H. Beale, Jr. in 16 *Harvard Law Rev.* 491.

³ *Steph. Dig. Crim. Law*, art. 49; *Lewis v. S.*, 35 Ala. 380; *Field, C. J.*, in *P. v. Murray*, 14 Cal. 159; *Kelly v. C.*, 1 Grant's Cas. (Pa.) 484, M. 342.

⁴ For a discussion of the line between preparation and attempt see: *P. v. Murray*, *ante*; *C. v. Kennedy*, 170 Mass. 18, 48 N. E. 770; *C. v. Peaslee*, 177 Mass. 267, 59 N. E. 55, M. 348; *U. S. v. Stephens*, 8 Sawy. C. C. 116.

it was intended as a step in the commission of a crime, as in the procuring dies for making counterfeit coins, it seems to be held to be an attempt; although, if explicable as a lawful act, it might be otherwise.¹ So taking a false oath in order to procure a marriage license is an attempt to marry without a license.² So taking an impression of a key to a storehouse and preparing a false key, with intent to enter and steal, has been held to be an attempt to steal.³ So setting aside certain goods with the purpose of later carrying them away.⁴ So making false statements is an attempt to obtain money under false pretences, the deception being discovered before the money is obtained.⁵ On the other hand, putting the finger on the trigger of a pistol at half-cock, or otherwise not in condition to be discharged, has been held not to constitute an attempt to shoot.⁶ Sending an order for the purchase of liquor in San Francisco, to be shipped to Alaska, is not an attempt to introduce liquor into Alaska.⁷ And the delivery of poison by A to B, in order that the latter might deliver it to C, to be taken by the latter, is not an "attempt to poison" by A.⁸ Nor is the actual administration of a substance supposed to be poisonous, but not so in fact.⁹ But *Regina v. Williams* was a case under a statute; and it seemed to be agreed by all the judges, that, while they must confine statutory attempts strictly to the terms of the statute, a less intimate connection of the act done with the crime intended is requisite in common law attempts.¹⁰

¹ *Rex v. Fuller*, R. & R. C. C. 405; *Reg. v. Roberts*, 7 Cox C. C. 39.

² *Reg. v. Chapman*, 3 Cox C. C. 467; *contra*, *P. v. Murray*, 14 Cal. 159. See *P. v. Stites*, 75 Cal. 570, 17 P. 693.

³ *Griffin v. S.*, 26 Ga. 493.

⁴ *Reg. v. Cheeseman*, L. & C. 140, K. 85.

⁵ *Reg. v. Eagleton*, 6 Cox C. C. 559; *Reg. v. Hensler*, 11 Cox C. C. 570.

⁶ *Rex v. Harris*, 5 C. & P. 159. See *Burton v. S.*, 109 Ga. 134, 34 S. E. 286.

⁷ *U. S. v. Stephens*, 8 Sawy. C. C. 116.

⁸ *Reg. v. Williams*, 1 Den. C. C. 39.

⁹ *S. v. Clarissa*, 11 Ala. 57.

¹⁰ *Reg. v. Roberts*, 7 Cox C. C. 39. See the cases illustrative very

§ 184. **Impossibility of Execution.** — It is not enough that the act done must have been more than a mere preparation for the crime, an actual step toward the commission of it: in addition thereto the means must be, to the apprehension of a reasonable man, calculated to effect the purpose. Using witchcraft for the purpose of killing an enemy is not an attempt to kill. "It is true, the sin and wickedness may be as great as an attempt or conspiracy by competent means; but human laws are made, not to punish sin, but to prevent crime and mischief."¹ Hence, striking at a man with a small stick is not sufficient to support an indictment for an attempt to kill.² On the other hand, it is enough, the other elements being present, that the act was apparently adapted to bring about the result sought, though not in reality sufficient.³ In England, it was once held that, to constitute an attempt, the act committed must be of such a nature and under such circumstances that the actor has the power to carry his intention into execution, and that thrusting the hand into the pocket of another with intent to steal a pocket-book, or some other article of property, is no attempt, if there be at the time nothing in the pocket to steal.⁴ But this doctrine has been abandoned even in England;⁵ and the contrary is generally, if not universally, held in this country.⁶

A somewhat different aspect of the principle that though the execution of the intended act may not in fact be possible,

fully collected and stated in 1 B. & H. Lead. Cr. Cas., note to *Rex v. Wheatley*, pp. 6-10; *Reg. v. Cheeseman*, 9 Cox C. C. 100, K. 85; *P. v. Murray*, 14 Cal. 159.

¹ Pollock, C. B., in *Attorney General v. Sillem*, 2 H. & C. 431, 525.

² *Kunkle v. S.*, 32 Ind. 220; see also *Lott v. S.*, 83 Miss. 609, 36 So. 11.

³ *C. v. Shaw*, 134 Mass. 221; *P. v. Gardener*, 144 N. Y. 119, 38 N. E. 1003.

⁴ *Reg. v. Collins*, 10 Jur. N. S. 686.

⁵ *Reg. v. Brown*, 38 W. R. 95, 24 Q. B. D. 357; *Reg. v. Ring*, 61 L. J. R. (M. C.) 116, K. 88.

⁶ *Harvick v. S.*, 49 Ark. 514, 6 S. W. 19; *S. v. Wilson*, 30 Conn. 500; *Hamilton v. S.*, 36 Ind. 280; *C. v. McDonald*, 5 Cush. (Mass.) 365; *P. v. Jones*, 46 Mich. 441, 9 N. W. 486; *P. v. Moran*, 123 N. Y. 254, 25 N. E. 412; *S. v. Beal*, 37 O. St. 108; *Clark v. S.*, 86 Tenn. 511, 8 S. W. 145.

the means adopted must be in themselves calculated to bring about the result finally desired, else the public tranquillity is not disturbed, and the act done not criminal, is seen when we consider the transaction, not from the point of view of the implements used, but of the physical end sought. Thus there must be some real object at which the act is aimed. Striking at a corpse, or shooting at a bush thinking it a man, is for this reason not an attempt to kill. And where a soldier, seeing a body of troops in the distance and thinking them hostile, rode toward them intending to desert, this was held not an attempt to desert when the troops in fact were friendly, not hostile.¹

So it is generally held that a boy under fourteen cannot be indicted for an assault with intent to commit rape, or for an attempt to commit rape.² This is based on the view that as the crime of rape is committed only when a woman is forced by a person over fourteen, a boy under that age, had he done all that he intended to do, would not have been guilty of rape; consequently, any steps falling short of success cannot be an attempt to commit what, if completed, would not have been, legally, rape. In other States it has been held that the fact that a boy under fourteen is presumed, either conclusively or *prima facie* to be incapable of committing rape has no bearing on the question of whether he may not in fact attempt, or make an assault with the intent, so to do; and that, if the other elements of an attempt are present, he should be convicted.³ Similarly, impotency is no defence to an indictment for an assault with intent to commit rape.⁴

§ 184a. **Desisting before Completed Crime** cannot, if the other elements are present, make the act done any the less an

¹ *Resp. v. Malin*, 1 Dall. (Pa.) 33. See also *S. v. Lawrence*, 178 Mo. 350, 77 S. W. 497; *Marley v. S.*, 58 N. J. L. 207, 33 Atl. 208, M. 352; *S. v. Cooper*, 2 Zab. (N. J.) 52; *S. v. Brooks*, 76 N. C. 1.

² *Reg. v. Williams*, [1893] 1 Q. B. 320; *McKinney v. S.*, 29 Fla. 565, 10 So. 732; *P. v. Randolph*, 2 Park. (N. Y.) 213; *Foster v. C.*, 96 Va. 306, 31 S. E. 503.

³ *Davidson v. C.*, 20 Ky. L. R. 540, 47 S. W. 213; *C. v. Green*, 2 Pick. (Mass.) 380, C. 117. See *Reg. v. Brown*, 24 Q. B. D. 357.

⁴ *Terr. v. Keyes*, 5 Dak. 244, 38 N. W. 440.

attempt.¹ Nor can the consent of the person attacked, as for example in rape, although sufficient to prevent the completed act from being rape, operate to take away the criminality of the transaction prior to the giving of the consent.² Similarly, the successful completion of the crime in a second State will not prevent whatever part of the transaction took place in the first State from being punishable there.³

§ 185. **Solicitation.**—To incite, solicit, advise, or agree with another to commit a crime is in itself a crime in the nature of an attempt, although the contemplated crime be not committed.⁴ But it has recently been said that the doctrine of these cases, if sound law, cannot be extended to the solicitation to commit a misdemeanor, a mere solicitation not amounting to an attempt.⁵ It would seem, however, that if solicitation is an attempt in the case of felony, it is in that of misdemeanor. It is certainly something more than intent, and the doctrine of the last case can better be supported upon the failure of the indictment sufficiently to set forth the mode of solicitation, than upon the point that mere solicitation is not an act.⁶ An offer to give a bribe, and an offer to accept a bribe, have been held to be indictable offences;⁷ and so have a challenge to fight a duel,⁸ and inviting another to send a challenge.⁹

¹ *Lewis v. S.*, 35 Ala. 380; *P. v. Stewart*, 97 Cal. 238, 32 P. 8; *Glover v. C.*, 86 Va. 382, 10 S. E. 420.

² *S. v. Bagan*, 41 Minn. 285, 43 N. W. 5; *S. v. Hartigan*, 32 Vt. 607.

³ *Regent v. P.*, 96 Ill. App. 189.

⁴ *Rex v. Higgins*, 2 East, 5, K. 83, M. 337; *Reg. v. Quail*, 4 F. & F. 1076, C. 139; *S. v. Avery*, 7 Conn. 266; *S. v. Sales*, 2 Nev. 268; *C. v. Randolph*, 146 Pa. 83, 23 Atl. 388; 3 Greenl. Ev. (13th ed.), § 2, and note; Steph. Dig. Cr. Law, arts. 47, 48; 1 Bish. New Cr. Law, § 767.

There are certain technical differences between a solicitation and an attempt in their relation to the substantive crime. The solicitor does not seek himself to perform the criminal act, but to get another to do it. If the act is completed he will be liable, not as principal but as accessory before the fact. See *Cox v. P.*, 82 Ill. 191; *Stabler v. C.*, 95 Pa. 318; *S. v. Butler*, 8 Wash. 194, 35 P. 1093.

⁵ *Smith v. C.*, 54 Pa. 208.

⁶ See *C. v. Hutchinson*, 6 Pa. Sup. Ct. 405, M. 338.

⁷ *Walsh v. P.*, 65 Ill. 58; *U. S. v. Worrall*, 2 Dall. 384.

⁸ *S. v. Farrier*, 1 Hawks (N. C.), 487; *C. v. Whitehead*, 2 Law Reporter, 148.

⁹ *Rex v. Philipps*, 6 East, 464.

Although suicide is not punishable, yet it is criminal,¹ and an unsuccessful effort at suicide is punishable as an attempt;² though in Massachusetts the phraseology of the statute, which makes attempts punishable by one-half the penalty provided for the completed crime, has practically made the offence of an attempt to commit suicide dispunishable.³ In some of the States suicide is not regarded as a crime, but by statute it is made a felony to persuade another to commit suicide.⁴

CONSPIRACY.

§ 186. We see, therefore, that it is a crime for one person to solicit another to commit a crime. It is one step in a series of acts, which, if continued, will result in an overt act; and although it may be ineffectual, it is part and parcel of what, if consummated, becomes a complete and effectual crime. It therefore partakes of its criminality, and belongs strictly, perhaps, to that class of crimes which is included under "attempts." Mutual solicitation by two or more persons is, of course, upon the same grounds, equally criminal; and when this mutual solicitation has proceeded to an agreement, it is regarded by the law as a complete and accomplished crime, which it denominates conspiracy, and defines to be "an agreement to do against the rights of another an unlawful act, or use unlawful means."

This definition carries us to a different kind of case. Where the end sought is criminal, then, as already explained, a solicitation thereto by a single individual would be criminal; and it is none the less so because reciprocal. But we may, within this definition, have a case where the end sought is either unlawful, though not criminal, or in itself entirely lawful. Here again, if, although the end be lawful, the means used are criminal, solicitation to use those means would be itself a crime: thus if A is in possession of lands to which B is en-

¹ *C. v. Mink*, 123 Mass. 422, C. 104, K. 110.

² *Reg. v. Doody*, 6 Cox C. C. 463.

³ *C. v. Dennis*, 105 Mass. 162.

⁴ *Blackburn v. S.*, 23 O. St. 146.

titled, the obtaining of possession by B is a lawful end, but if he endeavors to do so by force and violence he becomes a criminal,¹ and if C incites him so to do, C himself thereby becomes a criminal; and if C and B solicit each other so to do and agree thereto they are both guilty of conspiring to accomplish a legal end by criminal means. But we may, further, have a case where neither the end is criminal nor the means such as would be criminal if employed by a single individual. This case cannot be explained on any principle of solicitation. It is, however, well established that it is immaterial that the end sought is lawful, provided the means by which it is to be sought are unlawful. Nor is it necessary that that which is agreed to be done should be criminal, or in itself indictable. It is sufficient if it be unlawful,² the criminality of the act being found in the mere fact of the combination by which an undue and perhaps dangerous power and efficacy in bringing about the purpose sought are obtained.

§ 187. **In What Sense Unlawful.** — Yet perhaps not every unlawful act will support an indictment for conspiracy. Thus, it has been held in England that an agreement to trespass upon the lands of another, as to poach for game, is no conspiracy.³ And this case has been followed in New Hampshire.⁴ So it has been held that an agreement to sell an unsound horse with a warranty of soundness is not an indictable conspiracy.⁵ And it has even been held in New Jersey that to support an indictment for conspiracy there must be indictable crime, either in the end proposed or the means to be used.⁶ But all these are cases upon which later decisions have thrown great

¹ *Ante*, §§ 167-171.

² *Reg. v. Bunn*, 12 Cox C. C. 316, 1 Green's Cr. Law Rep. 52; *Reg. v. Warburton*, L. R. 1 C. C. 274; *S. v. Rowley*, 12 Conn. 101; *Smith v. P.*, 25 Ill. 17; *S. v. Mayberry*, 48 Me. 218; *C. v. Hunt*, 4 Met. (Mass.) 111; *S. v. Burnham*, 15 N. H. 396; *P. v. Mather*, 4 Wend. (N. Y.) 229, M. 385.

³ *Rex v. Turner*, 13 East, 228.

⁴ *S. v. Straw*, 42 N. H. 393.

⁵ *Rex v. Pywell*, 1 Stark. 402.

⁶ *S. v. Rickey*, 4 Halst. 293.

doubt, and neither perhaps would now be followed except upon its exact facts.¹

It may be that some unlawful acts or means might be held too trivial to support a charge of conspiracy; but what they are, and how trivial, we have no means of determining.²

However that may be, it seems to be settled that all combinations to defeat or obstruct the course of public justice, as by the presentation of false testimony,³ or tampering with witnesses,⁴ or with jurors,⁵ or with the making up of the panel,⁶ or preventing the attendance of witnesses,⁷ or by destroying evidence,⁸ or falsifying a public record,⁹ or rescuing a prisoner from jail¹⁰ are indictable as conspiracies, not only because of the greater power given by combination to accomplish the purpose but because all the acts mentioned are in themselves criminal,¹¹ and hence any solicitations or attempts toward them are for the same reason a crime.

Another class of cases that amount to conspiracies are agreements to cheat or injure the public or individuals. Thus a plan to procure copies of the questions to be put by a State examining board;¹² or for A to pass a civil service examination for and in the name of B,¹³ is a conspiracy. So, an agreement to collect a debt in a manner not allowed by law,¹⁴ or to defraud by imposing upon the public a spurious article for the

¹ See *Reg. v. Kenrick*, 5 Q. B. 49; *Reg. v. Rowlands*, 5 Cox C. C. 466, 490; *Lambert v. P.*, 9 Cow. (N. Y.) 578, in addition to cases cited *ante*, § 186.

² See *Reg. v. Kenrick*, *ante*.

³ *Rex v. Mawbey*, 6 T. R. 619.

⁴ *Rex v. Johnson*, 1 Show. 16.

⁵ *Rex v. Gray*, 1 Burr. 510; *P. v. O'Donnell*, 110 Ill. App. 250.

⁶ *Gallagher v. P.*, 211 Ill. 158, 71 N. E. 842.

⁷ *Rex v. Steventon*, 2 East, 362.

⁸ *S. v. De Witt*, 2 Hill (S. C.), 282.

⁹ *C. v. Waterman*, 122 Mass. 43.

¹⁰ *Kipper v. S.*, 42 Tex. Cr. R. 613, 62 S. W. 420.

¹¹ *Ante*, §§ 13, 140, 146-154.

¹² *S. v. Stewart*, 32 Wash. 103, 72 P. 1026.

¹³ *U. S. v. Curley*, 122 Fed. 738, 130 Fed. 1; under a statute punishing conspiracies with intent to defraud.

¹⁴ *C. v. Stambaugh*, 22 Pa. Supr. Ct. 386.

genuine,¹ or by running up the price of goods at an auction by means of false bids,² or by manufacturing false news or using coercive means to enhance or depress the price of property or labor,³ or by unlawful means to compel an employer to increase,⁴ or employees to reduce,⁵ the rate of wages. Under the older law it was held a criminal conspiracy to agree merely not to work for less than a given wage.⁶ But it seems clear that this would not be so held today. Employees, either individually or in a body, have a right to refuse to work for any wage that does not satisfy them.⁷ If, however, the agreement goes beyond this, and is not only to refrain from working themselves, but to compel other employees also to refuse to work, or to join the union, the conspiracy is criminal.⁸ So an agreement by boycotting to compel an employer to discharge certain employees is criminal.⁹ So, for the same reason, a combination to force a paper to reduce its advertising rates.¹⁰

Another class of criminal conspiracy is that embracing agreements to injure or disgrace others in their character, property, or business, as by seducing a female,¹¹ or by abducting a minor daughter, for the purpose of marrying her against

¹ *C. v. Judd*, 2 Mass. 329.

² *Reg. v. Lewis*, 11 Cox C. C. 404.

³ *Vertue v. Clive*, 4 Burr. 2473, K. 401; *Reg. v. Blake*, 6 Q. B. 126; *Levi v. Levi*, 6 C. & P. 239; *Rex v. De Berenger*, 3 M. & S. 67; *P. v. Sheldon*, 139 N. Y. 251, 34 N. E. 785; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173.

⁴ *Reg. v. Bunn*, 12 Cox C. C. 316; *C. v. Hunt*, 4 Met. (Mass.) 111; *S. v. Donaldson*, 32 N. J. L. 151; *P. v. Fisher*, 14 Wend. (N. Y.) 9.

⁵ *Rex v. Hammond*, 2 Esp. 719.

⁶ *Rex v. Journeyman-Tailors*, 8 Mod. 10, K. 404.

⁷ *S. v. Stockford* (Conn.), 58 Atl. 769. See also *Cote v. Murphy*, 159 Pa. 420, 28 Atl. 190.

⁸ *S. v. Dyer*, 67 Vt. 690, 32 Atl. 814.

⁹ *Rex v. Bykerdyke*, 1 M. & R. 179, M. 362; *S. v. Glidden*, 55 Conn. 46, 8 Atl. 890; *C. v. Hunt*, *ante*; *P. v. McFarlin*, 43 Misc. Rep. (N. Y.) 591, 89 N. Y. S. 527; *S. v. Stewart*, 59 Vt. 273, 9 Atl. 559, M. 377; *Crump v. C.*, 84 Va. 927, 6 S. E. 620.

¹⁰ *S. v. Huegin*, 110 Wis. 189, 85 N. W. 1046. For a further discussion of this question see 16 Harvard L. R. 389.

¹¹ *Smith v. P.*, 25 Ill. 17; *S. v. Savoye*, 48 Ia. 562; *Anderson v. C.*, 5 Rand. (Va.) 627.

the wish of her parents,¹ or by hissing an actor or injuring a play,² or by destroying one's property or depreciating its value,³ as by a conspiracy to stifle bidding at an auction,⁴ or by deceiving a partner as to how much is due him in the final settlements of the partnership accounts,⁵ or by falsely charging a man with being the father of a bastard child,⁶ or by getting him drunk in order to cheat him.⁷ Of course, all agreements to commit acts in themselves criminal, or to be accomplished by criminal means, and all acts *contra bonos mores*,⁸ are indictable conspiracies.

§ 188. **Agreement the Gist of the Offence.** — The law regards this unlawful combination of two or more evil-disposed persons as especially dangerous, since increase of numbers, mutual encouragement and support, and organization, increase the power for and the probability of mischief. And the conspiracy is punished to prevent the accomplishment of the mischief. It is, therefore, entirely immaterial whether the agreement be carried out, or whether any steps be taken in pursuance of the agreement; or whether the defendant withdrew before the crime planned was completed,⁹ or whether the plan was likely to miscarry,¹⁰ or that certain additions were afterward made to the agreement.¹¹ When the agreement is made, the crime is complete;¹² and it seems to be settled, without substantial dissent, that persons may be indictable

¹ *Mifflin v. C.*, 5 W. & S. (Pa.) 461. See *Rex v. Wakefield*, 2 Lewin, 1.

² *Clifford v. Brandon*, 2 Camp. 358.

³ *S. v. Ripley*, 31 Me. 386.

⁴ *Levi v. Levi*, 6 C. & P. 239.

⁵ *Reg. v. Warburton*, L. R. 1 C. C. R. 274.

⁶ *Reg. v. Best*, 2 Ld. Raym. 1167.

⁷ *S. v. Younger*, 1 Dev. (N. C.) 357.

⁸ *Young's Case*, 2 T. R. 734 (cited); *S. v. Murphy*, 6 Ala. 765; *S. v. Buchanan*, 5 H. & J. (Md.) 317.

⁹ *Dill v. S.*, 35 Tex. Cr. Rep. 240, 33 S. W. 126.

¹⁰ *P. v. Gilman*, 121 Mich. 187, 80 N. W. 4.

¹¹ *C. v. Rogers*, 181 Mass. 184, 63 N. E. 421.

¹² *Reg. v. Best*, 2 Ld. Raym. 1167; *Rex v. Gill*, 2 B. & Ald. 205; *C. v. Judd*, 2 Mass. 329; *C. v. Ridgway*, 2 Ashm. (Pa.) 247; *Hazen v. C.*, 23 Pa. 355; *S. v. Noyes*, 25 Vt. 415; *U. S. v. Cole*, 5 McLean C. Ct. 513, Fed. Cas. No. 14,832.

for conspiring to do that which they might have individually done with impunity.¹

If the conspiracy be executed, and a felony be committed in pursuance of it, the conspiracy disappears, being merged in the felony, and punishable as part of it.² It is otherwise, however, when a misdemeanor is committed. Here there is no merger, and the conspiracy is separately punishable.³

A conspiracy, from its very nature, must be participated in by more than one person. Hence, husband and wife alone cannot be indicted for this offence.⁴ So, if all but one of the conspirators are acquitted, that one cannot be found guilty.⁵

§ 189. **Intent.** — As in common law offences generally, there must be an actual wrongful intent in order to render the conspiracy criminal. Thus, if a person be deceived into becoming a conspirator, and is himself acting in good faith, he is not guilty.⁶ So, if two parties conspire to procure another to violate a statute, in order that they may extort money from him by threats of prosecution, they are indictable. But if the object be to secure the detection and punishment of suspected offenders, they are not.⁷

§ 190. **All Equally Guilty.** — All conspirators are equally guilty, whether they were partakers in its origin, or became partakers at a subsequent period of the enterprise; and each

¹ *Reg. v. Gompertz*, 9 Q. B. 824; *S. v. Buchanan*, 5 H. & J. (Md.) 317; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173; *Berkowitz v. U. S.*, 93 Fed. 452.

² *C. v. Blackburn*, 1 Duv. (Ky.) 4; *S. v. Mayberry*, 48 Me. 218; *C. v. Kingsbury*, 5 Mass. 106; *contra*: *Reg. v. Button*, 11 Q. B. Rep. N. S. 929; *Graff v. P.*, 108 Ill. App. 168; *Wait v. C.*, 24 Ky. L. R. 604, 69 S. W. 697. Compare *S. v. Setter*, 57 Conn. 461, 18 Atl. 782; *C. v. Dean*, 109 Mass. 349; *Johnson v. S.*, 26 N. J. L. 313.

³ *S. v. Murphy*, 6 Ala. 765; *S. v. Murray*, 15 Me. 100; *P. v. Richards*, 1 Mich. 216; *P. v. Mather*, 4 Wend. (N. Y.) 229, M. 385; *S. v. Noyes*, 25 Vt. 415.

⁴ *P. v. Miller*, 82 Cal. 107, 22 P. 934; *S. v. Clark*, 9 Houst. (Del.) 536, 33 Atl. 310; *C. v. Allen*, 24 Pa. Co. Ct. R. 65.

⁵ *Rex v. Thorp*, 5 Mod. 221, K. 407; *Rex v. Plummer*, [1902] 2 K. B. 339, 20 Cox C. C. 269; *S. v. Tom*, 2 Dev. (N. C.) 569.

⁶ *Rex v. Whitehead*, 1 C. & P. 67.

⁷ *Hazen v. C.*, 23 Pa. 355; but compare *ante*, § 22a.

is responsible for all acts of his confederates, done in pursuance of the original purpose.¹

§ 191. **Effect of Local Laws.** — In determining what is indictable as a conspiracy much depends upon the local laws of the place of the conspiracy. It may well be that in one jurisdiction that may be unlawful, and even criminal, which in another is not; and therefore it does not follow that because in one State or country where the common law is in force an agreement to do a particular act may be a conspiracy, the same would be true of another. This would depend upon local considerations. An indictment and conviction in one State may not be a precedent in another. Upon this point the following observations² are worthy of careful consideration: "Although the common law in regard to conspiracy in this Commonwealth is in force, yet it will not necessarily follow that every indictment at common law for this offence is a precedent for a similar indictment in this State. The general rule of the common law is, that it is a criminal and indictable offence for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual. This rule of law may be equally in force as a rule of the common law in England and in this Commonwealth; and yet it must depend upon the local laws of each country to determine whether the purpose to be accomplished by the combination, or the concerted means of accomplishing it, be unlawful or criminal in the respective countries. All those laws of the parent country, whether rules of the common law or early English statutes, which were made for the purpose of regulating the wages of laborers, the settlement of paupers, and making it penal for any one to use a trade or handicraft to which he had not

¹ *Frank v. S.*, 27 Ala. 37; *S. v. Wilson*, 30 Conn. 500; *Ferguson v. S.*, 32 Ga. 658; *P. v. Mather*, 4 Wend. (N.Y.) 229, M. 385. Compare *Handley v. S.*, 115 Ga. 584, 4 S. E. 992; *S. v. Furney*, 41 Kan. 115, 21 P. 213, and *ante*, § 71.

² *Shaw, C. J., C. v. Hunt*, 4 Met. (Mass.) 111.

served a full apprenticeship,—not being adapted to the circumstances of our colonial condition,—were not adopted, used, or approved, and therefore do not come within the description of the laws adopted and confirmed by the provision of the Constitution already cited. This consideration will do something toward reconciling the English and American cases, and may . . . show why a conviction in England, in many cases, would not be a precedent for a like conviction here.”

CHAPTER V.

CRIMES AGAINST RELIGION, MORALITY, AND DECENCY.

§ 193. Apostasy.
 194. Blasphemy.
 195. Adultery.
 196. Bigamy.
 197. Seduction.
 198. Abduction.

§ 199. Kidnapping.
 200. Abortion.
 201. Lasciviousness.
 202. Fornication.
 203. Sodomy.

§ 192. The principal common law crimes of this class are comprehended under three heads: crimes against Christianity, such as apostasy and blasphemy; crimes against the family relation, such as adultery, bigamy, seduction, and abortion; and sexual crimes, such as lasciviousness, fornication, and sodomy.

APOSTASY.

§ 193. **Apostasy** stands at the head of the list of crimes against religion of which the ancient common law took cognizance, and is defined as a total renunciation of Christianity by one who has embraced it.¹ The Church of England was and is a State institution, and it has been deemed to be the duty of the State to protect it, and through it the State religion. Hence the common law punished whatever was calculated to injure or degrade it. Out of this view of State policy grew the common law crimes of *Apostasy*, *Heresy*, *Simony*, *Non-conformity*, *Reviling the Ordinances of the Church*, *Blasphemy*, and *Profane Cursing and Swearing*. None of these, it is believed, except the last two, have ever been, or are likely to be, here recognized as crimes against the State; for though, as has already been seen,² Christianity is a part of the common law in this country as well as in

¹ 4 Bl. Com. 42.

² *Ante*, § 2.

England, yet, as we have no established church and no established religion to which the State is bound to extend its protection, most of these offences are left to the discipline of the various religious bodies in which they may arise. *Blasphemy* and *profane cursing and swearing*, however, being offences against good morals as well as hostile to the spirit of Christianity, have, by exception, in this country been held indictable,¹ and will now be considered.

BLASPHEMY.

§ 194. **Blasphemy** is, literally, evil-speaking. But only that kind of evil-speaking which injuriously affects the public is taken notice of by the common law, and, under this particular head, only the evil-speaking of sacred things. The definitions of blasphemy differ, according to the different views entertained by different ages and countries as to what things are so sacred as to require, in the interest of public order, their protection against assault. Thus, in Spain it is held to be blasphemous to speak evil of the saints;² and in Woolston's Case³ it was held blasphemous at common law to write against Christianity in general, while it was intimated that learned men might dispute about particular controverted points. Though the common law is understood to prevail in this country relative to this crime, except so far as it has been abrogated by statute, yet it cannot be doubted that its application would, at the present day, be greatly restricted. No such discussion would now be regarded as blasphemous, unless executed in such a manner as to betray a malicious purpose to calumniate and vilify, and to such an extent as to become an injury to public morals. Good morals, being one of the strong foundations of social order, must be encouraged and protected. Whatever, therefore, tends essentially to sap such foundation is punishable, upon the same ground as is the publication of obscene writing or pictures.

¹ See 1 Bl. Com., bk. 4. c. 4.

² Bouv. Dict., "Blasphemy."

³ 2 Stra. 834.

No category of the sacred things with reference to which blasphemy may be committed has been given in any description or definition of the offence by the courts or text-writers. It has been held to be blasphemous to deny the existence of God, with the intent to calumniate and disparage;¹ so, to speak of the Saviour as a "bastard," with like intent,² or as an impostor and murderer;³ so, with like intent, to speak of the Holy Scriptures as "a fable," and as containing "many lies,"⁴ or otherwise maliciously to revile them.⁵ Christianity is a part of the common law of this country, and its principles are so interwoven with the structure of modern society that whatever strikes at its root tends manifestly to the dissolution of civil government. "Blasphemy," says Chancellor Kent,⁶ "according to the most precise definitions, consists in maliciously reviling God or religion,"—as satisfactory a definition, perhaps, as can be given, taking religion to mean that body of doctrine and belief commonly accepted as Christianity.

Whether the words are spoken or written is immaterial. They must, however, if spoken, be heard by somebody, and, if written, be published.⁷

Many of the States have enacted statutes prescribing the punishment which shall be imposed in certain cases of blasphemy; but these statutes are not regarded as changing the common law, except so far as their special terms provide. What was blasphemy at common law is still blasphemy, subject to the modifications of the statute.⁸

Profanity is an offence analogous to blasphemy, which will

¹ *C. v. Kneeland*, 20 Pick. (Mass.) 206.

² *S. v. Chandler*, 2 Harr. (Del.) 553; *P. v. Ruggles*, 8 Johns. (N. Y.) 290.

³ *Rex v. Waddington*, 1 B. & C. 26.

⁴ *Updegraph v. C.*, 11 S. & R. (Pa.) 394.

⁵ *Rex v. Hetherington*, 5 Jur. (1st ser.) 529.

⁶ *P. v. Ruggles*, *ante*.

⁷ *P. v. Porter*, 2 Parker (N. Y.), C. R. 114; *S. v. Powell*, 70 N. C. 67.

⁸ 1 Bish. Cr. Law, § 80, and cases there cited.

be further treated under the head of Nuisance, of which both offences are special forms.¹

ADULTERY.

§ 195. **Adultery** is the unlawful and voluntary sexual intercourse between two persons of opposite sexes, one at least of whom is married. It is not an offence at common law,² and although in most of the States it is not made criminal, it is in some of them cognizable only in the ecclesiastical tribunals. The foregoing definition is based upon the general terms of the statutes of the several States under which it is not material which of the parties is married, the offence being adultery on the part of the married person, and fornication on the part of the unmarried.³ But it embraces a wider field, no doubt, than comes within the original idea of adultery, which was the introduction of spurious offspring into the family, whereby a man may be charged with the maintenance of children not his own, and the legitimate offspring be robbed of their lawful inheritance, making it necessary that one of the parties should be a married woman. In some of the States, this idea still prevails as to criminal prosecutions for adultery, while in suits for divorce the intercourse of a married man with an unmarried woman is held to be adultery.⁴ The statutes of the several States so differ, however, that while in some States intercourse of an unmarried man with a married woman is adultery on the part of the man,⁵ in others intercourse by a

¹ The question of the unconstitutionality of such laws, as restrictive of the liberty of speech and of the press, is elaborately discussed, and decided in the negative, by Shaw, C. J., in *Com. v. Kneeland* (*ante*), which, with the cases in New York and Pennsylvania before cited, are leading cases upon the subject.

² 4 Bl. Com. 65.

³ *Miner v. P.*, 58 Ill. 59; *S. v. Hutchinson*, 36 Me. 261; *C. v. Call*, 21 Pick. (Mass.) 509. In other States it is adultery by both parties: *S. v. Hinton*, 6 Ala. 864; *Lyman v. P.*, 198 Ill. 544, 64 N. E. 974; *S. v. Wilson*, 22 Ia. 364; *S. v. Byrum*, 60 Neb. 384, 83 N. W. 207.

⁴ *S. v. Armstrong*, 4 Minn. 335.

⁵ *S. v. Pearce*, 2 Blackf. (Ind.) 318; *S. v. Weatherby*, 43 Me. 258; *S. v. Wallace*, 9 N. H. 515.

married man with an unmarried woman is not adultery on the part of the latter,¹ and in others, an unmarried man cannot commit adultery.²

That the parties cohabited in the honest belief that they had a right to, and did not intend to commit the crime, is no defence, as has already been shown.³

“Open and notorious adultery” cannot be shown by the mere act of adultery. The fact of openness and notoriety must be proved, and that the party charged publicly and habitually violated the law.⁴ So “living in adultery” means more than a single act of illicit intercourse.⁵

Where two are charged with adultery, committed together, they may be tried together; and one may be tried and convicted, though the other has not been arrested.⁶ So where one of the parties was so intoxicated as to be ignorant that the act was committed, the other may be convicted alone.⁷ And it has been held that, where the parties are tried separately, and one is acquitted, the other may be convicted.⁸ But where they are tried together, it would of course be impossible to acquit one and convict the other.⁹

BIGAMY.

196. **Bigamy**, otherwise called *polygamy*, or the offence of having a plurality of wives or husbands at the same time,

¹ *Cook v. S.*, 11 Ga. 53; *S. v. Armstrong*, 4 Minn. 335; *S. v. Lash*, 16 N. J. L. 380.

² *Resp. v. Roberts*, 2 Dall. (Pa.) 124; *C. v. Lafferty*, 6 Grat. (Va.) 672.

³ *Ante*, §§ 52 et seq.; *S. v. Goodenow*, 65 Me. 30.

⁴ *P. v. Gates*, 46 Cal. 52; *Miner v. P.*, 58 Ill. 59; *Wright v. S.*, 5 Blackf. (Ind.) 358; *S. v. Marvin*, 12 Ia. 499; *Carrotti v. S.*, 42 Miss. 334; *S. v. Crouner*, 56 Mo. 147; *ante*, § 15.

⁵ *Smith v. S.*, 39 Ala. 554; *Bodiford v. S.*, 86 Ala. 67, 5 So. 559; *Jackson v. S.*, 116 Ind. 464, 19 N. E. 330; *Richardson v. S.*, 37 Tex. 346; *Collins v. S. (Tex.)*, 80 S. W. 372.

⁶ *S. v. Carroll*, 30 S. C. 85, 8 S. E. 433.

⁷ *C. v. Bakeman*, 131 Mass. 577; *S. v. Cutshall*, 109 N. C. 764, 14 S. E. 107.

⁸ *Alonzo v. S.*, 15 Tex. App. 378.

⁹ *S. v. Rinehart*, 106 N. C. 787, 11 S. E. 512.

was, like adultery, an offence of ecclesiastical cognizance, but ultimately became a statutory offence,¹ the marrying another by a person already married and having a husband or wife living being made a felony. This statute was adopted by Maryland as one which "by experience had been found applicable to their local and other circumstances," and is there held to this day, except as to the punishment, to be a part of the common law. And by the law of Maryland the crime is a felony, as doubtless it is in other States, where punishment in the State prison is or may be the penalty.² It is substantially the law in most, if not all, of the States of the Union.

It is only the second marriage which is criminal; and therefore, if the first marriage be in one jurisdiction and the second in another jurisdiction, the crime is only committed in, and of course only cognizable by the tribunals of, the latter.³ Equally, of course, if the first marriage is invalid, the second is no offence anywhere,—in fact, there is no second marriage.⁴ Thus where the defendant first marries A, then, while she is still his wife, marries B, and then, after the death or divorce of A, but while his relation with B is unchanged, marries C, this last marriage is not bigamous, since the marriage with B, because of the then subsisting marriage with A was wholly void; and the later dissolution of the latter leaves him single.⁵ We must, however, distinguish cases where the first marriage is not void but simply voidable, as, for example, if contracted under the age of consent; the mere fact of its voidability does not make the second the less bigamous,⁶ simi-

¹ 1 James I, c. 11; 4 Bl. Com. 164.

² *Ante*, § 10.

³ 1 Hawk. P. C. bk. 1, c. 43; *Johnson v. C.*, 86 Ky. 122, 5 S. W. 365; *Putnam v. Putnam*, 8 Pick. (Mass.) 433; *C. v. Lane*, 113 Mass. 458; *P. v. Mosher*, 2 Park. (N. Y.) C. R. 195.

⁴ *P. v. Slack*, 15 Mich. 193; *Shaffer v. S.*, 20 O. 1; *S. v. Barefoot*, 2 Rich. (S. C.) 209; *McReynolds v. S.*, 5 Cold. (Tenn.) 18.

⁵ *C. v. M'Grath*, 140 Mass. 296, 6 N. E. 515; *Lane v. S.*, 82 Miss. 555, 34 So. 353; *Keneval v. S.*, 107 Tenn. 581, 64 S. W. 897; *S. v. Goodrich*, 14 W. Va. 834.

⁶ *S. v. Barefoot*, *ante*; *P. v. Slack*, *ante*; *Beggs v. S.*, 55 Ala. 108; *P. v. McQuaid*, 85 Mich. 123, 48 N. W. 161; *S. v. Cone*, 86 Wis. 498, 57 N. W. 50.

larly if the first marriage has been ratified by subsequent cohabitation.¹

Of course the fact that the bigamous marriage is void is no defence. In the nature of things there can be but one lawful marriage, and if the first be valid the second is void; nor is it material that the second would be void on other grounds. The offence consists in the entering into a void marriage while a prior valid marriage relation exists,² and is complete without cohabitation.³

A divorce may, and unless restricted in its terms usually does, annul the former marriage, so as to make the second one valid. In some States, however, the guilty party in a divorce for adultery on his part may be guilty of polygamy by marrying without leave of court while his divorced wife is living.⁴ But after a divorce in one State, a marriage in another, valid by the laws of that State, followed by a return to the State where the divorce was granted, and a cohabitation there with the second wife, will not be held polygamous, unless the second wife be an inhabitant of the State granting the divorce, and the parties went to another State to be married, in order to evade the law.⁵ Conversely, the fact that in the divorce from the first marriage the defendant was forbidden to remarry will not make the second one void so as to render a third non-bigamous.⁶ So if the party goes to another State merely for the purpose of obtaining a divorce, and obtains it by fraud, it will be of no avail to him on his return to the

¹ *Hampton v. S.*, 45 Ala. 82; *McReynolds v. S.*, *ante*.

² *Reg. v. Brawn*, 1 C. & K. 144; *Reg. v. Allen*, L. R. 1 C. C. 367; *Robinson v. C.*, 6 Bush. (Ky.) 309; *P. v. Brown*, 34 Mich. 339; *Hayes v. P.*, 25 N. Y. 390; *Carmichael v. S.*, 12 O. St. 553.

³ *Nelms v. S.*, 84 Ga. 466, 10 S. E. 1087; *C. v. Lucas*, 158 Mass. 81, 32 N. E. 1033; *S. v. Smiley*, 98 Mo. 605, 12 S. W. 247; *Gise v. C.*, 81 Pa. 428.

⁴ *C. v. Putnam*, 1 Pick. (Mass.) 136; *Baker v. P.*, 2 Hill (N. Y.), 325.

⁵ *C. v. Lane*, 113 Mass. 458, *semble*; *Pennegar v. S.*, 87 Tenn. 244, 10 S. W. 305. So with miscegenation: *S. v. Kennedy*, 76 N. C. 251; *Kinney v. C.*, 30 Grat. (Va.) 858; *contra*: *Stevenson v. Gray*, 17 B. Mon. (Ky.) 193; *Medway v. Needham*, 16 Mass. 157.

⁶ *Thompson v. S.*, 28 Ala. 12.

State he left and marrying again there.¹ So if the State granting the divorce had no jurisdiction;² and it has been held that the crime may be committed although the defendant in good faith believed his former partner was dead or divorced.³ The bigamy statutes, however, generally contain a provision whereby the defendant is freed from criminal liability if he marries only after a lapse of a specified number of years if he has no grounds to believe the absent spouse to be alive. Whether the formerly unmarried party to a polygamous marriage, if he married with knowledge of the other party's disability, is also guilty of any offence, and what, is an open question, and may be solved differently in different States, according to the degree of the principal offence, whether felony or misdemeanor, or by special provisions of the statute.⁴

SEDUCTION.

§ 197. It is at least doubtful whether seduction was an indictable offence by the old common law.⁵ It seems, however, to have been the subject of statutory prohibition as long ago as the time of Philip and Mary,⁶ whereby, after reciting that "maidens and women" are, "by flattery, trifling gifts, and fair promises," induced by "unthrifty and light personages," and by those who "for rewards buy and sell said maidens and children," it is made unlawful for any person or persons to "take or convey away, or cause to be taken or conveyed away, any maid or woman child, being under the

¹ *Crawford v. S.*, 73 Miss. 172, 18 So. 848.

² *P. v. Dawell*, 25 Mich. 247; *S. v. Armington*, 25 Minn. 29; *Andrews v. Andrews*, 188 U. S. 14. Compare *P. v. Baker*, 76 N. Y. 78; *Atherton v. Atherton*, 181 U. S. 155.

³ *Rogers v. C.*, 24 Ky. L. R. 119, 68 S. W. 14; *C. v. Mash*, 7 Met. (Mass.) 472, C. 88; *contra*: *Reg. v. Tolson*, L. R. 23 Q. B. D. 168, K. 15; *Squire v. S.*, 46 Ind. 459, C. 90; *Welch v. S. (Tex.)*, 81 S. W. 50. Compare *P. v. Hartman*, 130 Cal. 487, 62 P. 823; *S. v. Goodenow*, 65 Me. 30; *S. v. Zichfield*, 23 Nev. 304, 46 P. 802; *ante*, §§ 53 et seq.

⁴ See *Bish. Cr. Proc.*, § 594; *Boggus v. S.*, 34 Ga. 275.

⁵ *Rex v. Moor*, 2 Mod. 128; *Rex v. Marriot*, 4 Mod. 144, 1 East P. C. 448.

⁶ 4 & 5 Ph. & M., c. 8, §§ 1, 2.

age of sixteen years," out of the possession of their lawful custodian. There seems to be no reason to doubt that this statute became a part of the common law of the Colonies,¹ and it seems to have been adopted by statute, and acted upon in South Carolina with certain modifications, — the limitation to heiresses, for instance, being regarded as not applicable to the condition of society in that jurisdiction. Indeed, it was held that such a limitation was not in the act itself fairly interpreted.² The distinction between abduction and seduction seems to be that the former is presumed to be by force, or its equivalent, for the purposes of marriage or gain; while the latter is presumed to be without force, and by enticement, for the purpose of illicit intercourse.³ The distinction is by no means clearly made, and the decisions in indictments for abduction and seduction will be found interchangeably useful to be consulted. In Connecticut, the statute punishes "whoever seduces a female"; and seduction is held *ex vi termini* to imply sexual intercourse, and is defined to be "an enticement" of the female "to surrender her chastity by means of some art, influence, promise, or deception calculated to effect that object"; and the seduction is proved, though it appear that it followed a promise of marriage made in good faith.⁴ Here, too, as in the cases to be cited illustrative of the statutes against abduction, by "previous chaste character" is meant actual personal virtue,⁵ which is presumed to exist, unless it be shown that the woman has had illicit intercourse with the defendant or another prior to the seduction,⁶ and may still

¹ *C. v. Knowlton*, 2 Mass. 530, C. 1.

² *S. v. Findlay*, 2 Bay (S. C.), 418; *S. v. O'Bannon*, 1 Bail. (S. C.) 144. See also *S. v. Tidwell*, 5 Strobb. (S. C.) 1, which, however, is a case for abduction under the third and fourth sections of the statute.

³ *S. v. Crawford*, 34 Ia. 40.

⁴ *S. v. Bierce*, 27 Conn. 319; *S. v. Brandenburg*, 118 Mo. 181, 23 S. W. 1080; *Dinke v. C.*, 17 Pa. 126; *Croghan v. S.*, 22 Wis. 444. See the statutes of several States collected, 8 Amer. St. Rep. 870, n.

⁵ *Munkers v. S.*, 87 Ala. 94, 6 So. 357; *Walton v. S.*, 71 Ark. 398, 75 S. W. 1; *Lyons v. S.*, 52 Ind. 426; *S. v. Smith*, 124 Ia. 334, 100 N. W. 40; *Kenyon v. P.*, 26, N. Y. 203; *Crozier v. P.*, 1 Park. (N. Y.) C. C. 453.

⁶ *Caldwell v. S.* (Ark.), 83 S. W. 929; *Wood v. S.*, 48 Ga. 192;

exist if it be shown that, though at some former time she may have yielded to the defendant, she had reformed, and was a chaste woman at the time of the seduction.¹ And it seems that, if the alleged seducer be a married man, and known to be such by the female said to have been seduced, and the means of seduction are alleged to be a promise of marriage, this is not such a false and fraudulent act as could lead to the betrayal of the confidence of any virtuous woman, and has not therefore the element of fraud which is necessary to constitute the crime of seduction.² So where the promise to marry is no part of the influence under which the woman yields, but is a mere matter of bargain, there is no seduction.³ So where she is willing to have intercourse, but stipulates for a marriage in the event of pregnancy.⁴ Where, however, the promise in the

S. v. Higdon, 32 Ia. 262; *P. v. Brewer*, 27 Mich. 134; *P. v. Clark*, 33 Mich. 112; *Ferguson v. S.*, 71 Miss. 805, 16 So. 355; *P. v. Kearney*, 110 N. Y. 188, 17 N. E. 736; *Griffin v. S.*, 109 Tenn. 17, 70 S. W. 61; *Barnard v. S. (Tex.)*, 76 S. W. 475; *Mills v. C.*, 93 Va. 815, 22 S. E. 833; *contra*: that the defendant being presumed to be innocent the burden is on the prosecution to show, as one of the elements in its case, that the woman was chaste, *P. v. Wallace*, 109 Cal. 611, 42 P. 159; *Williams v. S.*, 130 Ind. 58, 29 N. E. 1078; *C. v. Whittaker*, 131 Mass. 224; *S. v. Lockerby*, 50 Minn. 363, 52 N. W. 958; *S. v. Eckler*, 106 Mo. 585, 17 S. W. 814; *Harvey v. T.*, 11 Okl. 156, 65 P. 837; *Oliver v. C.*, 101 Pa. 215.

¹ *Wilson v. S.*, 73 Ala. 527; *S. v. Carron*, 18 Ia. 372; *P. v. Gibbs*, 70 Mich. 425, 38 N. W. 257; *S. v. Timmens*, 4 Minn. 325; *S. v. Thornton*, 108 Mo. 640, 18 S. W. 841. But see *Cook v. P.*, 2 T. & C. (N. Y.) 404.

² *Wood v. S.*, *ante*; *Hinkle v. S.*, 157 Ind. 237, 61 N. E. 196; *P. v. Alger*, 1 Parker C. C. (N. Y.) 333. See also *Boyce v. P.*, 55 N. Y. 644, and *post*, § 198. The case of *Wood v. S.* is sometimes cited as holding the doctrine that it is not necessary, in order to show that a woman is not a virtuous woman, to prove that she has been guilty of previous illicit intercourse, but it is sufficient to show that her mind has become deluded by unchaste and lustful desires. But though this was the view of the judge who gave the opinion, it was distinctly disavowed by Warren, C. J., and Trippe, J., — a majority of the court, — who held to the contrary.

³ *P. v. Clark*, 33 Mich. 112; *S. v. Reeves*, 97 Mo. 668, 10 S. W. 811.

⁴ *P. v. Van Alstyne*, 144 N. Y. 361, 39 N. E. 343; *P. v. Ryan*, 63 App. Div. (N. Y.) 429, 71 N. Y. S. 527; *S. v. Adams*, 25 Or. 172, 35 P. 36; *contra*: *S. v. O'Hare (Wash.)*, 79 P. 39.

event of pregnancy is merely one of the elements leading to the consent, there may be a seduction.¹

The actual consent of the woman is not necessary in order to constitute the crime of seduction; ² but if such force is used as amounts to a rape, the crime of seduction is not committed.³

ABDUCTION.

§ 198. **Abduction** was made a crime by an old statute,⁴—sufficiently old to have been brought with our ancestors to this country as part of the common law.⁵ The specific offence seems to have been limited to the taking away for lucre, — no doubt by force, fraud, or fear, — of adult females, “maid, widow, or wife,” having property, or being heirs apparent, for the purpose of marriage. A taking for lucre and a marriage or defilement are essential to the completion of the offence.⁶ And perhaps the distinction between this offence and kidnapping consists in this limitation, — kidnapping relating to the taking away of any person, and more especially children, for any unlawful purpose. It may be, also, that abduction might be complete without taking the person abducted out of the realm, but only from home to some other place within the realm; while it was essential to the act of kidnapping that the person seized should be taken out of the country, or, at all events, seized with that intent.⁷ It is now an offence for the most part, if not entirely, regulated by statute.

These statutes variously describe and define the offence. While the substance is substantially the same in all, yet there are specific differences which distinguish, and leave it uncer-

¹ *Cherry v. S.*, 112 Ga. 871, 38 S. E. 341; *S. v. Hughes*, 106 Ia. 125, 76 N. W. 520. As to the effect of subsequent marriage, see *ante*, § 23a.

² *S. v. Horton*, 100 N. C. 443, 6 S. E. 238.

³ *S. v. Lewis*, 48 Ia. 578; *P. v. De Fore*, 64 Mich. 693, 31 N. W. 585.

⁴ 3 Hen. VII, c. 6.

⁵ *C. v. Knowlton*, 2 Mass. 530, C. 1.

⁶ *Baker v. Hall*, 12 Coke, 100; *C. v. Nickerson*, 5 All. (Mass.) 519, M. 75; *Gould v. S.* (Neb.), 99 N. W. 541; *Griffin v. S.*, 109 Tenn. 17, 70 S. W. 61; *S. v. Rhoades*, 29 Wash. 61, 69 P. 389.

⁷ See *post*, § 199, *Tores v. S.* (Tex.), 63 S. W. 880.

tain, till a comparison of the statutes solves the question, whether the decisions in one State are applicable to the statutes in another. Under these several statutes it has been held that abduction "for the purpose of prostitution," means for general and promiscuous illicit intercourse. A mere seduction and illicit intercourse¹ with the seducer does not amount to prostitution.² But if the purpose is that the woman shall enter into such a course of life as shall constitute prostitution or concubinage, the crime is at once committed; no long continuance of the life is necessary.³ Where a statute provides that the person so abducted must have been of previous chaste character, the abduction of a person who had been previously a prostitute is not within the statute, unless she had reformed.⁴ If she had previously had intercourse with the defendant only, it seems that this cannot be held to be conclusive of previous unchaste character. The unchastity must be with other men.⁵ In a case in Indiana,⁶ a distinction is made between the phrase "of previous chaste character," as used in the statute against abduction, and the phrase "of good repute for chastity," used in another section of the same statute against seduction. In the former case, a single proven act of illicit intercourse is admissible in defence, as the issue is actual personal virtue; while in the latter case it might not be, as reputation is the issue. But the distinction is between "character" used in one statute, and "repute" used in the other; and it may be doubted if the distinction is not too fine. Very high authorities treat character and reputation as substantially identical.⁷

It is also held under these statutes that within the meaning

¹ Haygood v. S., 98 Ala. 61, 13 So. 325; Bunfil v. P., 154 Ill. 640, 39 N. E. 565; S. v. Gibson, 108 Mo. 575, 18 S. W. 1109; U. S. v. Zes Cloya, 35 Fed. 493.

² S. v. Ruhl, 8 Ia. 447; S. v. Stoyell, 54 Me. 21; C. v. Cook, 12 Met. (Mass.) 93; S. v. Rorebeck, 158 Mo. 130, 59 S. W. 67; S. v. Brow, 64 N. H. 577, 15 Atl. 216; P. v. Parshall, 6 Park. (N. Y.) C. R. 129.

³ Henderson v. P., 124 Ill. 607, 17 N. E. 68.

⁴ S. v. Carron, 18 Ia. 372; Carpenter v. P., 8 Barb. (N. Y.) 603.

⁵ S. v. Willspaugh, 11 Mich. 278.

⁶ Lyons v. S., 52 Ind. 426.

⁷ See 1 Greenl. Ev., § 461 and notes.

of the term "forcible abduction" are included cases where the mind of the person is operated upon by falsely exciting fears, by threats, fraud, or other unlawful or undue influence amounting substantially to a coercion of the will, and an effective substitute for actual force.¹ And a child four years old is incapable of consenting to be taken away by the father from the mother.² Where a statute limits the offence to the abduction of persons within a specified age, it is held that the fact that the abductor did not know, or even the fact that he had reason to believe, and did believe, that the person taken away was not within the designated age, is immaterial. The act is at the peril of the perpetrator.³

KIDNAPPING.

§ 199. **Kidnapping** is defined by Blackstone as the forcible abduction or stealing away of a man, woman, or child from his own country and sending him away to another.⁴ And this definition has been adopted, with the modification that the carrying away need not be into another country.⁵ It is false imprisonment, with the element of abduction added.⁶ And here, as in false imprisonment, fraud or fear may supply the place of force.⁷

ABORTION.

§ 200. Although there is⁸ the precedent of an indictment for an attempt to procure an abortion as a crime at common law, and it has been said by a distinguished text-writer⁹ that the procuring of an abortion is an indictable offence at common

¹ *Moody v. P.*, 20 Ill. 315; *P. v. Parshall*, 6 Park. (N. Y.) C. R. 129.

² *S. v. Farrar*, 41 N. H. 53. See also *C. v. Nickerson*, 5 All. (Mass.) 519, M. 75; and *ante*, § 197.

³ *Reg. v. Prince*, 13 Cox C. C. 138; *S. v. Ruhl*, 8 Ia. 447; *ante*, § 56.

⁴ 4 Bl. Com. 219; *Click v. S.*, 3 Tex. 282.

⁵ *S. v. Rollins*, 8 N. H. 550.

⁶ *Click v. S.*, *ante*.

⁷ *Moody v. P.*, 20 Ill. 315; *Payson v. Macomber*, 3 All. (Mass.) 69; *Hadden v. P.*, 25 N. Y. 373. See also *Abduction, False Imprisonment*.

⁸ 3 Chitty Cr. Law, 557.

⁹ 2 Whart. Cr. Law, § 1220.

law, it is found upon examination that the precedent referred to is for an assault, and the case¹ relied upon as an authority is also for an assault. The better opinion is, that the procuring of an abortion is not, as such, an indictable offence at common law, although the acts done in pursuance of such a purpose do undoubtedly amount to other offences which the common law recognizes and punishes. But the procuring of an abortion with the consent of the mother before she is quick with child is not, at common law, even an assault, the consent of the mother effectually doing away with an element necessary to the constitution of an assault.² The procuring it after that time is a misdemeanor, and may be a murder.³

Under a statute punishing the procurement of an abortion "by means of any instrument, medicine, drug, or other means whatever," the indictment charging that the defendant beat a certain pregnant woman with intent to cause her to miscarry, it was held that the case was not made out by proof that the defendant beat her, and caused her thereby to miscarry, unless the beating was with that intent.⁴

This view of the common law doubtless led to such statutes as prevail in Massachusetts, Vermont, and New York, and probably most of the other States, punishing the procurement of a miscarriage, or the attempt to procure it, under which it is held that the consent of the woman is no excuse, and that the crime may be committed though the child be not quick.⁵

¹ *C. v. Demain*, 6 Pa. L. J. 29. A later case in Pennsylvania, however, holds that an indictment will lie: *Mills v. C.*, 13 Pa. 631, M. 536. See *Met. Slagle v. S.*, 83 N. C. 630.

² *Mitchell v. C.*, 78 Ky. 204; *Smith v. S.*, 33 Me. 48; *C. v. Parker*, 9 (Mass.) 263; *S. v. Cooper*, 22 N. J. L. 52.

³ *Reg. v. West*, 2 C. & K. 784; *Smith v. S.*, *ante*; *C. v. Parker*, *ante*; *S. v. Cooper*, *ante*; *Evans v. P.*, 49 N. Y. 86.

⁴ *Slattery v. P.*, 76 Ill. 217. See also *ante*, § 32.

⁵ *S. v. Magnell*, 3 Penne. (Del.) 307, 51 Atl. 606; *S. v. Alcorn*, 7 Ida. 599, 64 P. 1014; *Lamb v. S.*, 67 Md., 524, 10 Atl. 208, 298; *C. v. Wood*, 11 Gray (Mass.), 85; *P. v. Davis*, 56 N. Y. 95; *Cobel v. P.*, 5 Park. (N. Y.) C. R. 348; *Mills v. C.*, 13 Pa. 631, M. 536; *S. v. Howard*, 32 Vt. 380; *contra*: *Sullivan v. S.* (Ga.), 48 S. E. 949 (*semble*). See also *Willey v. S.*, 46 Ind. 363; *S. v. Fitzgerald*, 49 Ia. 260; *S. v. Van Houten*, 37 Mo. 357; *S. v. Murphy*, 3 Dutch. (N. J.) 112.

And under the New York statute the woman who takes drugs to effect a miscarriage is equally guilty with the person who administers them to her.¹ Yet she is not strictly an accomplice, the law regarding her rather as a victim than a perpetrator.²

Upon general principles, as we have already seen, an attempt to commit a statutory misdemeanor or felony is itself a misdemeanor, indictable and punishable as such at common law.³

LASCIVIOUSNESS.

§ 201. **Lasciviousness** is punishable at common law, and embraces indecency and obscenity, both of word and act; as the indecent exposure of one's person in a public place,⁴ or the use of obscene language in public.⁵ It is immaterial how many or how few may see or hear, if the act be done in public where many may see or hear.⁶ And the permission of those for whose decent appearance one is responsible to go about publicly in a state of nudity has been held to be lewdness on the part of the person so permitting.⁷ Under statutes against lascivious behavior and lascivious carriage,—substantially the same,—it seems to be the law that the offence may be committed by exposure of the person and solicitation to sexual intercourse, without the consent of the party so solicited, although it be not done in a public place.⁸ This, however, would not amount to open and gross lewdness.⁹ Lascivious *cohabitation* implies something more than a single act of sexual

¹ *Frazer v. P.*, 54 Barb. (N. Y.) 306; *accord*: *McCaughey v. S.*, 156 Ind. 41, 59 N. E. 169.

² *Dunn v. P.*, 29 N. Y. 523; *ante*, § 76.

³ *Ante*, § 18.

⁴ *S. v. Rose*, 32 Mo. 560.

⁵ *S. v. Appling*, 25 Mo. 315.

⁶ *Van Houten v. S.*, 46 N. J. L. 16; *S. v. Millard*, 18 Vt. 574; *ante*, § 15.

⁷ *Britain v. S.*, 3 Humph. (Tenn.) 203.

⁸ *Fowler v. S.*, 5 Day (Conn.), 81; *S. v. Millard*, *ante*. See also *Dillard v. S.*, 41 Ga. 278; *C. v. Wardell*, 128 Mass. 52.

⁹ *C. v. Catlin*, 1 Mass. 8; but see *C. v. Wardell*, 128 Mass. 52, 53.

intercourse;¹ it must be shown that the parties lived together as man and wife, not being legally married.²

FORNICATION.

§ 202. **Fornication** is the unlawful sexual intercourse of an unmarried person with a person of the opposite sex, whether married or unmarried. In some States such intercourse with a married person is made adultery. Like adultery, it was originally of ecclesiastical cognizance only; and without circumstances of aggravation, which will make it part and parcel of another offence, it is not believed to have been recognized as an offence at common law in this country.³ The statutes of the several States, however, generally, if not universally, make it punishable under certain circumstances of openness and publicity, which perhaps would make it indictable if there were no statute.⁴ And where it is indictable, it has been frequently held that, on failure to prove the marriage of the party indicted for adultery, he may be found guilty of fornication, if the circumstances alleged and proved would warrant a conviction on an indictment for fornication.⁵

SODOMY.

§ 203. **Sodomy**, otherwise called buggery, bestiality, and the crime against nature, is the unnatural copulation of two persons with each other, or of a human being with a beast.⁶ This

¹ *Penton v. S.*, 42 Fla. 560, 28 So. 774; *Lawson v. S.*, 116 Ga. 571, 42 S. E. 752; *S. v. Marvin*, 12 Ia. 499; *S. v. Cassida*, 67 Kan. 171, 72 P. 522; *C. v. Calef*, 10 Mass. 153; *S. v. Miller*, 42 W. Va. 215, 24 S. E. 882.

² *Pruner v. C.*, 82 Va. 115.

³ *S. v. Rahl*, 33 Tex. 76; *S. v. Cooper*, 16 Vt. 551.

⁴ *Terr. v. Whitecomb*, 1 Mont. 359; *S. v. Moore*, 1 Swan (Tenn.), 136; *S. v. Cooper*, 16 Vt. 531; *Anderson v. C.*, 5 Rand. (Va.) 627; 4 Bl. Com. 65, and note by Chitty; *contra*: *Musfelt v. S.*, 64 Neb. 445, 90 N. W. 237. Former good reputation for chastity is no defence: *Boatwright v. S.*, 42 Tex. Cr. R. 442, 60 S. W. 760. See also *Cook v. S.*, 11 Ga. 53.

⁵ *S. v. Cowell*, 4 Ired. (N. C.) 231; *Resp. v. Roberts*, 2 Dall. (Pa.) 124. See also *C. v. Squires*, 97 Mass. 59; *S. v. Cox*, 2 Taylor (N. C.), 165.

⁶ 1 Hawk. P. C. (8th ed.), 357.

crime was said to have been introduced into England by the Lombards, and hence its name, from the Italian, *bugarone*.¹ It may be committed by a man with a man, by a man with a beast;² or by a woman with a beast, or by a man with a woman,—his wife, in which case, if she consent, she is an accomplice.³ But the act, if between human beings, must be *per anum*, and the penetration of a child's mouth does not constitute the offence.⁴ If both parties consent, both are guilty, unless one be under the age of discretion.⁵ Under the old common law, both penetration and emission were necessary to constitute the offence;⁶ but since the statute of 9 Geo. IV, c. 31, § 18, penetration only is necessary.⁷ Before this statute, copulation with a fowl was not an offence, as a fowl is not a "beast"; but this statute covers copulation with any "animal." It was always regarded as a very heinous offence, and was early denounced as "the detestable and abominable crime amongst Christians not to be named," and was a felony punishable with death.⁸ But though it is still a felony in most of the States, it is, we believe, nowhere capitally punished. In some of the States, where there is no crime not defined in the code, it seems to have been purposely dropped from the category of crimes.⁹ The origin of the term "sodomy" may be

¹ Coke, 3d Inst. 58.

² A fowl is now held in England to be a beast: *Reg. v. Brown*, 24 Q. B. D. 357.

³ *Reg. v. Jellyman*, 8 C. & P. 604.

⁴ *Rex v. Jacobs*, R. & R. C. C. 331; *P. v. Boyle*, 116 Cal. 658, 48 P. 800; *Prindle v. S.*, 31 Tex. Cr. R. 551, 21 S. W. 360; *contra*, by statute: *Herring v. S.*, 119 Ga. 709, 46 S. E. 876; *Honselman v. P.*, 168 Ill. 172, 48 N. E. 304; *S. v. McGruder* (Ia.), 101 N. W. 646.

⁵ *Reg. v. Allen*, 1 Den. C. C. 364; Coke, 3d Inst. 58.

⁶ *Rex v. Duffin*, 1 R. & R. C. C. 365; *P. v. Hodgkins*, 94 Mich. 27, 53 N. W. 794; *contra*: *White v. C.*, 24 Ky. L. R. 2349, 73 S. W. 1120; *S. v. Vicknair*, 52 La. Ann. 1921, 28 So. 273.

⁷ *Rex v. Reekspear*, 1 Moo. C. C. 342.

⁸ 1 Hawk P. C. (8th ed.) 357.

⁹ But few cases occur in the reports. *C. v. Snow*, 111 Mass. 411; *Lambertson v. P.*, 5 Park. (N. Y.) C. R. 200; *C. v. Thomas*, 1 Va. Cas. 307. In *Fennell v. S.*, 32 Tex. 378, it is held by a divided opinion not

found in the nineteenth chapter of Genesis. The practice was first denounced by the Levitical law as a heathen practice, and amongst non-Christian nations, at the present day, it is not generally regarded as criminal.

to be an offence, on the ground that it is not defined by statute, no undefined offence being punishable there. See also *Estes v. Carter*, 10 Ia. 400; *Davis v. S.*, 3 H. & J. (Md.) 154.

20 p. 252 ✓
CHAPTER VI.

OFFENCES AGAINST THE PERSON.

§ 205. Assault.
217. Mayhem.
218. Homicide.

§ 240. False Imprisonment.
241. Rape.
245. Robbery.

§ 204. The principal offences against the person may be divided into three classes: first, an injury to the person, ranging in enormity from a simple assault to homicide; secondly, a false imprisonment of the person; and, thirdly, composite crimes, in which a wrongful act is committed by the use of violence to the person, such as robbery and larceny from the person, and rape.

ASSAULT.

§ 205. Strange as it may seem, there is no definition of an assault which meets unanimous acceptance. The more generally received definition is that of Hawkins,¹ to wit: "An attempt or offer with force and violence to do a corporal hurt to another." We have already seen,² that to constitute an attempt there must be some overt act in part execution of a design to commit a crime; and upon the theory that an assault is but an attempt, it is held that a mere purpose to commit violence, unaccompanied by any effort to carry it into immediate execution, is not an assault. The violence which threatens the "corporal hurt" or, as it is frequently expressed, "personal injury," or "bodily harm," must be set in motion.³ It is the beginning of an act, or of a series of acts,

¹ 1 P. C. (8th ed.) 110.

² *Ante*, § 183.

³ *P. v. Yslas*, 27 Cal. 630; *Smith v. S.*, 39 Miss. 521.

which, if consummated, will amount to a battery, which is the unlawful application of violence to the person of another. One, therefore, who, within such proximity to another that he may inflict violence, lifts his hand, either with or without a weapon, with intent to strike, or lifts a stone with intent to hurl it, or seizes a loaded gun with intent to fire it, is, upon all the authorities,¹ guilty of an assault.

The better view would seem to be that an assault includes any putting of another in reasonable fear of immediate personal violence.²

§ 206. **Battery.** — A battery is the unlawful touching of another, or of the dress worn by another, with any the least violence.³ An act which begins as an assault ordinarily ends as a battery, and merges in it; and since on an indictment for battery the defendant may be found guilty of a simple assault, it is an invariable rule to indict for assault and battery. For this reason, the two crimes are not carefully distinguished; the general name *assault* being applied indifferently to both. No useful end would be served by insisting on a distinction not made by the courts. In the following discussion, therefore, the term *assault* will be used indifferently to designate true assault and the completed battery.

§ 207. **Authority.**⁴ — The force to constitute an assault must be unlawful. A parent, or other person standing *in loco parentis*, may use a reasonable amount of force in the correction of his child.⁵ So a schoolmaster may correct his pupil; or a master his apprentice;⁶ but the master's authority

¹ U. S. v. Hand, 2 Wash. (U. S. C. Ct.) 435, Fed. Cas. No. 15,297; accord: S. v. Morgan, 3 Ired. (N. C.) 186; Higginbotham v. S., 23 Tex. 574. The Penal Code of Texas defines an assault as "Any attempt to commit a battery, or any threatening gesture, showing in itself, or by words accompanying it, an immediate intention, coupled with an ability, to commit a battery." Art. 476.

² Steph. Dig. Cr. Law, art. 241; Reg. v. St. George, 9 C. & P. 483; S. v. Davis, 1 Ired. (N. C.) 125; *post*, §§ 212, 213.

³ Steph. Dig. Cr. Law, art. 241; Reg. v. Day, 1 Cox C. C. 207.

⁴ *Ante*, § 62.

⁵ S. v. Alford, 68 N. C. 322; Thompson v. S. (Tex.), 80 S. W. 623.

⁶ Gardner v. S., 4 Ind. 632.

is personal, and cannot be delegated to another, as can that of a parent.¹ An officer may also use such force in making an arrest;² and so, generally, may all persons having the care, custody, and control of public institutions, and charged with the duty of preserving order and preventing their wards from self-injury, such as the superintendents of asylums and almshouses.³ So the conductor of a railway train may forcibly put from his train any person guilty of such misconduct as disturbs the peace or safety of the other passengers, or violates the reasonable orders of the company.⁴ And so may the sexton of a church⁵ in a like way protect a lawful assembly therein. This right, however, must be exercised with discretion, and must not, in degree or in kind of force, surpass the limits of necessity and appropriateness.⁶ The modern tendency is to construe strictly against the person using the force. It was formerly held that a husband might correct his wife by corporal chastisement; but this is now denied to be law in some of the States, and it is doubtful if the practice would be upheld by the courts of any State.⁷ The mere relationship of master and servant, the former not being charged with any duty of education or restraint, will not now, whatever may have been the law heretofore, authorize the use of force.⁸

§ 208. **Consent.** — When a person *sui juris*, without fraud or coercion, consents to the application of force, certainly, if the force be such as may be lawfully consented to, there can be no assault. It has been accordingly held that, if a woman

¹ *P. v. Phillips*, 1 Wheeler C. C. (N. Y.) 155.

² *Ante*, § 59 et seq.; *Golden v. S.*, 1 S. C. 292.

³ *S. v. Hull*, 34 Conn. 132.

⁴ *S. v. Goold*, 53 Me. 279; *P. v. Caryl*, 3 Park. C. C. (N. Y.) 326.

⁵ *C. v. Dougherty*, 107 Mass. 243.

⁶ *C. v. Randall*, 4 Gray (Mass.), 36.

⁷ *Fulgham v. S.*, 46 Ala. 143; *Moody v. S.*, 120 Ga. 868, 48 S. E. 340; *S. v. Washington*, 104 La. 443, 29 So. 55; *C. v. McAfee*, 108 Mass. 458; *S. v. Ross*, 26 N. J. L. 224; *S. v. Oliver*, 70 N. C. 60, M. 399; *Gorman v. S.*, 42 Tex. 221. See also Mr. Green's note to *C. v. Barry*, 2 Green's Cr. Law Rep. 285.

⁸ *Matthews v. Terry*, 10 Conn. 455.

consents to her own dishonor,¹ or to the use of instruments whereby to procure an abortion,² or one requests another to lash him with a whip,³ these several acts do not constitute assaults, because they are assented to by the parties upon whom the force is inflicted; and the same has been held where two men privately spar together.⁴

But consent to the doing of one kind of physical act does not authorize the doing of another, and the second one is an assault. Thus consent to eat an apple is not consent to have administered poison concealed in the apple;⁵ so consent to intercourse is not consent to the administration of animal poison.⁶

Again, as has been seen,⁷ no one has a right to consent to an act which is liable to cause severe bodily harm to himself or another, or to lead to a breach of the peace. Though consent in such a case may be shown to negative a putting in fear, yet if there has been an actual battery the consent will be no excuse. So, if two men publicly engage in a fight with fists, each may be indicted for an assault and battery.⁸

In the class of cases just discussed, the consent is not recognized so as to make the touching any the less a battery because the common law regards such transactions as being too dangerous to public peace and the welfare of its citizens at large to allow it. A similar question arises under the statutes forbidding intercourse with girls under the age of consent. If the act is completed the consent is admittedly no defence.

¹ *Reg. v. Meredith*, 8 C. & P. 589; *P. v. Bransby*, 32 N. Y. 525; *Smith v. S.*, 12 O. St. 466.

² *C. v. Parker*, 9 Met. (Mass.) 263; *S. v. Cooper*, 2 Zab. (N. J.) 52.

³ *S. v. Beck*, 1 Hill (S. C.), 363, M. 68.

⁴ *Reg. v. Young*, 10 Cox C. C. 371.

⁵ *C. v. Stratton*, 114 Mass. 303, C. 155.

⁶ *Reg. v. Clarence*, 22 Q. B. D. 23, M. 514; *Reg. v. Bennett*, 4 F. & F. 1105.

⁷ *Ante*, § 23.

⁸ *Reg. v. Lewis*, 1 C. & K. 419; *S. v. Lonon*, 19 Ark. 577; *C. v. Colberg*, 119 Mass. 350, C. 160; *S. v. Underwood*, 57 Mo. 40. See, however, *contra*, *Duncan v. C.*, 6 Dana (Ky.), 295; *Champer v. S.*, 14 O. St. 437, M. 69.

A more difficult question arises when the indictment is for assault with intent to commit the statutory rape. In this case some courts, construing the statute as covering only the act of intercourse, have held that where the indictment is for an assault the consent of the girl makes the act permitted and hence not criminal, and the fact that had the intercourse taken place the consent would have been no defence is immaterial.¹ On the other hand, in most of the States the consent is held no defence. In some jurisdictions this is put on the ground that as the statute has made consent to the intercourse impossible, therefore any act in the nature of an attempt must be criminal as an assault,² a view that would seem doubtful on sound principle. In other jurisdictions the same result has been reached on the ground that it was the purpose of the statute to make invalid the consent of the girl, not only to the act of intercourse, but to any act in furtherance thereof which would be, without consent, sufficient to amount to an assault.³

Another class of cases is where the defendant because of his position is able to dominate the will of the person assaulted so that no actual resistance is offered, as where a female pupil of tender years, by the dominating power of her teacher, is induced, without resistance, to permit improper liberties to be taken.⁴ It is well settled that this is an assault. For consent obtained by threats of such a character as to overpower the will is no consent.⁵ Consent is the affirmative act of an un-

¹ Reg. v. Read, 2 C. & K. 957; Reg. v. Banks, 8 C. & P. 574; S. v. Pickett, 11 Nev. 255; Smith v. S., 12 O. St. 466; Hardin v. S., 39 Tex. Cr. Rep. 426, 46 S. W. 803.

² P. v. Stewart, 85 Cal. 174, 24 P. 722; T. v. Keyes, 5 Dak. 244, 38 N. W. 440; S. v. Grossheim, 79 Ia. 75, 44 N. W. 541 (*semble*); Hays v. P., 1 Hill (N. Y.), 351.

³ Murphy v. S., 120 Ind. 115, 22 N. E. 106 (overruling Stephens v. S., 107 Ind. 185, 8 N. E. 94); S. v. Roosnell, 143 Mass. 32, 8 N. E. 747; P. v. McDonald, 9 Mich. 150; P. v. Courier, 79 Mich. 366, 44 N. W. 571; Davis v. S., 31 Neb. 247, 47 N. W. 854; S. v. Johnston, 76 N. C. 209; S. v. Wheat, 63 Vt. 673, 22 Atl. 720 (*semble*); Fizzell v. S., 25 Wis. 364.

⁴ Reg. v. Nichol, R. & R. 130; Reg. v. Lock, 12 Cox C. C. 244.

⁵ Reg. v. Saunders, 8 C. & P. 265; Reg. v. Williams, 8 C. & P. 286; Reg. v. Hallett, 9 C. & P. 748; Reg. v. Woodhurst, 12 Cox C. C. 413; C. v. Burke, 105 Mass. 376; P. v. Quin, 50 Barb. (N. Y.) 128.

constrained will, and is not sufficiently proved by the mere absence of dissent,¹ and is therefore to be distinguished from mere submission. A mere submission, as of an idiot,² or of a child,³ or of a person asleep,⁴ or otherwise unconscious, or unable to understand what is going on, is not equivalent to consent.

§ 209. **Consent Secured by Fraud.**—In some cases, it has been said that there may be an assault when the injured party apparently consents to the unlawful act, as where a female patient is deceived by a physician into consenting that improper liberties should be taken with her.⁵ These cases may be rested either on the ground that there was no intelligent assent to the act done, or on the ground that the fraud vitiates the consent.

§ 210. **Degree of Force. Mode of Application.**—The degree of force used is immaterial, provided it be unlawful. The least intentional touching of the person, or of that which so appertains to the person as to partake of its immunity, if done in anger, or rudely, or insultingly, is sufficient. Thus to embrace⁶ or kiss⁷ a woman against her will; so to throw water upon the clothes,⁸ to spit upon, push, forcibly detain, falsely imprison, and even to expose to the inclemency of the weather, are all acts which have respectively been held to constitute an assault.⁹ So any forcible taking of property from the possession of another, by overcoming the slightest resist-

¹ *Reg. v. Lock*, 12 Cox C. C. 244.

² *Reg. v. McGavaren*, 6 Cox C. C. 64; *Reg. v. Fletcher*, 8 Cox C. C. 131; *Reg. v. Woodhurst*, *ante*. Compare *Reg. v. Connolly*, 26 U. C. Q. B. 317.

³ *Reg. v. Lock*, *ante*.

⁴ *Reg. v. Mayers*, 12 Cox C. C. 311.

⁵ *Reg. v. Case*, 4 Cox C. C. 220, 1 Den. C. C. 580; *Rex v. Rosinski*, 1 Moo. 19, M. 74; *Bartell v. S.*, 106 Wis. 342, 82 N. W. 142.

⁶ *Balkum v. S.*, 115 Ala. 117, 22 So. 532; *Stripling v. S.* (Tex.), 80 S. W. 376.

⁷ *Chambless v. S.* (Tex.), 79 S. W. 577.

⁸ *P. v. McMurray*, 1 Wheeler C. C. (N. Y.) 62.

⁹ 1 Russ. on Crimes (5th ed.), 957; *Long v. Rogers*, 17 Ala. 540; *S. v. Philley*, 67 Ind. 304; *C. v. McKie*, 1 Gray (Mass.), 61; *S. v. Baker*, 65 N. C. 332; *Wilson v. S.* (Tex.), 74 S. W. 315.

ance, is an assault.¹ Nor need the application of force be direct. If the force unlawfully set in motion is communicated to the person, whether directly, by something attached to the person, as a cane or a cord,² or indirectly, as where a squib is thrown into a crowd, and is tossed from one to another, it is sufficient.³ But the mere lifting of a pocket-book from the pocket of another, or snatching a bank-bill from his hand, without overcoming any resisting force, is not an assault.⁴ But setting a dog or a crowd upon another, or urging a horse against him,⁵ or driving against the carriage in which he is seated, or striking the horse he is riding or driving, in either case to his injury, will constitute an assault.⁶

§ 211. **Mode of Application.**—It was formerly held that to put a deleterious drug into the food of another, if it be eaten and take effect, was an assault.⁷ Upon subsequent consideration, it was held in England that the direct administration of a deleterious drug, without force, though ignorantly taken, is not an assault,⁸—overruling the previous case. A contrary result, however, has been reached in this country by a court of high authority, and with the reasoning of the two just cited cases before it,—the doctrine of the earlier case being approved; and it is said that it cannot be material whether the force set in motion be mechanical or chemical, or whether it acts internally or externally.⁹

¹ *S. v. Gorham*, 55 N. H. 152.

² *S. v. Davis*, 1 Hill (S. C.), 46, M. 527.

³ *Hill v. S.*, 63 Ga. 578.

⁴ *C. v. Ordway*, 12 Cush. (Mass.) 270.

⁵ *S. v. Lewis*, 4 Penne. (Del.) 332, 55 Atl. 3.

⁶ 1 Russ. on Crimes (5th ed.), 958; 2 Greenl. Ev., § 84; *Kirland v. S.*, 43 Ind. 146, 2 Green's Cr. Law Rep. 706; *P. v. Moore*, 50 Hun (N. Y.), 356, 3 N. Y. S. 159; *Johnson v. Tompkins*, 1 Bald. C. Ct. 571, Fed. Cas. No. 7,416.

⁷ *Reg. v. Button*, 8 C. & P. 660.

⁸ *Reg. v. Hanson*, 2 C. & K. 912, and notes.

⁹ *C. v. Stratton*, 114 Mass. 303, C. 155; *accord*: *Carr v. S.*, 135 Ind. 1, 34 N. E. 533; *S. v. Monroe*, 121 N. C. 677, 28 S. E. 547. So the communication of venereal disease: *Reg. v. Clarence*, 22 Q. B. D. 23, M. 514; *Reg. v. Bennet*, 4 F. & F. 1105; *Reg. v. Sinclair*, 13 Cox C. C. 28.

The detention or imprisonment of a person by merely confining him in a place where he happens to be, as by locking the door of the room where he lies asleep, without the use of any force or fraud to place him there, though illegal, does not come within any definition of assault, although the language of some of the old text-writers is broad enough to cover it. Mr. Justice Buller¹ says: "Every imprisonment includes a battery, and every battery an assault," citing Coke upon Littleton, 253,—where it is merely said that an imprisonment is a "corporall dammage, a restraint upon personal liberty, a kind of captivity,"—obviously no authority for the proposition that every imprisonment includes an assault, though it is authority for the proposition that an imprisonment may be a cause of action. It is probable that such an imprisonment only as follows unlawful arrest was in the mind of that great judge and common lawyer.² And in one case at least in this country³ the court has gone very near to that extent. But it would not be safe to say that such is the law. There may be an imprisonment by words without an assault.⁴

§ 212. **Putting in Fear.**—Although the threatened force be not within striking distance, yet if it be part of an act or series of acts which, if consummated, will, in the apprehension of the person threatened, result in the immediate application of force to his person, this will amount to an assault, without battery; as where one armed with a weapon rushes upon another, but before he reaches him is intercepted and prevented from executing his purpose of striking;⁵ or rides after him, upon horseback, and compels him to seek shelter to escape a battery;⁶ or a man chases a woman through a piece of woods, crying, "Stop!" until she arrives at a house, when

¹ N. P. 22.

² See note to Bridgman's edition of Buller, p. 22. In *Emmett v. Lyne*, 1 B. & P. N. R. 255, the proposition is said to be absurd, and the fact that it is unsupported by the authority of Coke or Littleton pointed out.

³ *Smith v. S.*, 7 Humph. (Tenn.) 43.

⁴ *Bird v. Jones*, 7 Q. B. 742; *Pike v. Hanson*, 9 N. H. 491; *Johnson v. Tompkins*, 1 Bald. C. Ct. 571, Fed. Cas. No. 7,416.

⁵ *Stephens v. Myers*, 4 C. & P. 349; *S. v. Davis*, 1 Ired. (N. C.) 125.

⁶ *Martin v. Shoppee*, 3 C. & P. 373; *S. v. Sims*, 3 Strobb. (S. C.) 137.

he turns back, and gives up the chase.¹ The force of fear, taking effect, supplies the actual violence.²

Mere words, however menacing, it seems long to have been universally agreed, do not amount to an assault. Though the speaking of the words is an act, it is not of such importance as to constitute an attempt to commit violence. It is not "violence begun to be executed."³ Consequently, mere words can never constitute a justification for an attack on the person using them.⁴ But words accompanied by acts which indicate an intent to commit violence, and threaten application of force to the assaulted party unless the assailant be interrupted, constitute an assault.⁵

It is none the less an assault where the words of the defendant show the person assailed that he will not be injured, if the price of his safety is doing something he is under no obligation to do or refraining from doing something that he has a right to do; as where the defendant says he will shoot the person assailed if the latter goes any further along a public road, or if he does not give up certain property.⁶ On the other hand, where the acts of the defendant, though threatening, are accompanied by words that show there is no present danger, no assault has been committed; as where the defendant shakes his fist and says, "If it were not for your years I would hit you."⁷

§ 213. **Menace, but no Intent to Commit a Battery.** — It has been recently held that, if there is menace of immediate personal injury such as to excite apprehension in the mind of a

¹ *S. v. Neely*, 74 N. C. 425.

² *Balkum v. S.*, 40 Ala. 671; *C. v. White*, 110 Mass. 407, C. 153.

³ 1 Hawk. P. C. (8th ed.) 110.

⁴ *S. v. Burton*, 2 Penn. (Del.) 472, 47 Atl. 619; *Rauck v. S.*, 110 Ind. 384, 11 N. E. 450; *S. v. Leuhrman*, 123 Ia. 476, 99 N. W. 140; *S. v. Griffin*, 87 Mo. 608.

⁵ *P. v. Yslas*, 27 Cal. 630.

⁶ *Keefe v. S.*, 19 Ark. 190; *S. v. Sears*, 86 Mo. 169; *S. v. Morgan*, 3 Ire. (N. C.) 186; *S. v. Horne*, 92 N. C. 805; *U. S. v. Myers*, 1 Cranch C. C. 310, Fed. Cas. No. 15,845, M. 506.

⁷ *C. v. Eyre*, 1 S. & R. (Pa.) 347; *accord*: *Tuberville v. Savage*, 1 Mod. 3, M. 505; *S. v. Crow*, 23 N. C. 375.

reasonable man, although the person threatening intended not to injure, as where one person, within shooting distance, points an unloaded gun at another knowing that it is not loaded, it is an assault,¹ adopting the following definition of Mr. Bishop:² "An assault is any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury." And this seems to be the doctrine of the Scotch law.³ But no well-considered English case has gone to this extent, though there is a dictum by Mr. Baron Parke⁴ which supports the doctrine, while other and later cases are to the contrary.⁵ Nor has any other American case been found which goes so far. On the contrary, there are several which seem to imply that, if the gun be not loaded, it may be shown by the accused in defence.⁶ A man who menaces another with corporal injury, with intent to excite his fears, may no doubt be guilty of an indictable offence;⁷ but whether the offence constitutes an assault must be considered an open question. An intent to commit one crime cannot make a party guilty of committing another which he did not intend, unless the unintended one be actually committed. Nor does it follow, because a person may be justified in availing himself of force to avoid or ward off apprehended bodily harm, that bodily harm is intended. Not every supposed assault is an actual one, nor does it seem logical or just that the misapprehension of one can fix criminal responsibility upon another, though the latter cannot be allowed to com-

¹ *C. v. White*, 110 Mass. 407, C. 153.

² 2 Cr. Law, § 23.

³ *Morrison's Case*, 1 Brown (Justic. Rep.), 394.

⁴ *Reg. v. St. George*, 9 C. & P. 483.

⁵ *Blake v. Barnard*, 9 C. & P. 626; *Reg. v. James*, 1 C. & K. 530.

⁶ See, in addition to the cases very fully collected by Mr. Bishop, 2 Cr. Law, § 32, n. 1, p. 20: *Tarver v. S.*, 43 Ala. 354; *Richels v. S.*, 1 Sneed (Tenn.), 606; *Burton v. S.*, 3 Tex. App. 408. See also Mr. Green's note to *C. v. White*, 2 Green's C. L. R. 269, in which the doctrine of the principal case is denied, and the cases upon which it is supposed to rest carefully examined.

⁷ *S. v. Benedict*, 11 Vt. 236.

plain that he has suffered the consequences of a misapprehension to which he has given rise.¹

This apparent conflict in the decisions would seem to be due to the fact that the word assault is used in two senses. It may mean the doing of certain acts that will culminate in a battery: thus the cases mentioned (*ante*, § 212) of attempted injuries where the assailant was stopped before actually inflicting them; so the case where mere exposure to the weather of an infant child was held an assault (*Reg. v. March*,² *contra Reg. v. Renshaw*³). So in the statement that every battery includes an assault. On the other hand the defendant may engage in a course of action which, though he does not in fact intend it to culminate in a battery, produces just as much terror in the one against whom it is directed, and creates just as much public disturbance. In this sense of the term assault the essence of the wrong is the injury and shock to the feelings, as the battery is to the body. In this sense the defendant both intended and accomplished his crime. The view of the Massachusetts court prevails in several other jurisdictions.⁴ On the other hand there are cases that hold not only that there is an assault wherever there is an attempted battery, i. e., the first meaning of the term, but that it is only then that there can be an assault.⁵

§ 214. **Self-defence.**⁶ — As every person has the right to protect himself from injury, he may, when assaulted, use

¹ *McKay v. S.*, 44 Tex. 43, a case in which the point is elaborately considered and the definition of Mr. Bishop disapproved; s. c. 1 Am. Cr. Rep. 46.

² 1 C. & K. 496, M. 507.

³ 2 Cox C. C. 285.

⁴ *S. v. Shepherd*, 10 Ia. 126; *S. v. Acher*, 8 Kan. App. 737, 54 P. 927; *S. v. Llewellyn*, 93 Mo. App. 469, 67 S. W. 677; *P. v. Morehouse*, 53 Hun (N. Y.), 638, 6 N. Y. S. 763; *S. v. Sims*, 3 Strobb. (S. C.) 137, M. 509; *S. v. Lightsey*, 13 S. C. 114, 20 S. E. 975; *S. v. Smith*, 2 Humph. (Tenn.) 457.

⁵ See in addition to the cases cited, *ante*, *Chapman v. S.*, 78 Ala. 463, M. 511; *P. v. Sylva*, 143 Cal. 62, 76 P. 814; *S. v. Burton*, 2 Penne. (Del.) 472, 47 Atl. 619; *Klein v. S.*, 9 Ind. App. 365, 36 N. E. 763; *S. v. Godfrey*, 17 Or. 300, 20 P. 625; *S. v. Hunt*, 25 R. I. 75, 54 Atl. 773 (*semble*).

⁶ *Ante*, §§ 63 et seq.

against his assailant such reasonable force in degree and kind as may be necessary and appropriate for his protection. But if he go beyond that limit, he becomes in his turn guilty of assault.¹

There seems to be no necessity for retreating or endeavoring to escape from the assailant before resorting to any means of self-defence short of those which threaten the assailant's life. Nor where one has been repeatedly assaulted, and has reason to believe that he will be again, is he bound to seek the protection of the authorities. He may resist the attack, and, if it comes, repel force with force.²

But before the assaulted party will have the right to kill his assailant, he must endeavor to avoid the necessity, if it can be done with safety. If, however, there be reasonable apprehension of danger so imminent, or of such a character, that retreat or delay may increase it, then the assaulted party is justified in entering upon his defence at once, and anticipating the danger.³

Such force may also be used in defence of those whom it is one's right or duty, from relationship or otherwise, to protect, and indeed in defence of any one unlawfully assailed.⁴

§ 215. **Defence of Property.**⁵ — So force may be used in defence of one's house or his property. A man's house is his castle, for defence and security of himself and his family. And if it is attacked, even though the object of the attack be to assault the owner, he may, without retreating, meet the assailant at the threshold, and prevent his access to the house, if need be, even by taking his life.⁶ But here, as in other cases of self-defence, if the intruder be driven off, following and beating him while on his retreat becomes in its turn an assault.⁷

¹ *Reg. v. Driscoll*, C. & M. 214; *C. v. Ford*, 5 Gray (Mass.), 475; *Gallagher v. S.*, 3 Minn. 270; *S. v. Gibson*, 10 Ired. (N. C.) 214.

² *Gallagher v. S.*, *ante*; *Evers v. P.*, 6 T. & C. (N. Y.) 156.

³ *S. v. Bohan*, 19 Kan. 28. See also *post*, Homicide.

⁴ 1 Bish. New Cr. Law, § 877.

⁵ *Ante*, § 66.

⁶ *Bohannon v. C.*, 8 Bush (Ky.), 481; *Pond v. P.*, 8 Mich. 150; *S. v. Patterson*, 45 Vt. 308; *S. v. Martin*, 30 Wis. 216.

⁷ *S. v. Conally*, 3 Or. 69.

And in defence of property the resistance cannot extend to taking the life of the intruder where there is a mere forcible trespass, but only, if at all, where it is necessary to prevent the felonious taking or destruction of the property.¹

But though a man will be justified in such extreme measures in defence of his property, this can only be to prevent it from being taken away from him. He cannot resort to any force which would amount to an assault or breach of the peace to recapture his stolen property,² as the preservation of the public peace is of greater importance than the status of any man's private property.

§ 216. **Accidental Injury.**³ — If a person doing a lawful act in a proper manner, without intent to harm another, sets in motion a force which by accident becomes hurtful, this is no assault. Thus, where one throws an object in a proper direction, and by striking some other object it is made to glance, or is driven by the wind out of its course, so that it strikes another, or if, without being turned from its course, it hits a person not known to be in the vicinity when the object is thrown, the act is in no sense criminal.⁴ So one is not guilty of a criminal assault when the horse he is driving runs away and injures a man,⁵ or where he shoots in self-defence and accidentally injures a bystander.⁶

MAYHEM.

§ 217. **Mayhem** is defined by Blackstone⁷ as "the violently depriving another of the use of such of his members as may render him the less able, in fighting, either to defend himself or to annoy his adversary." Amongst these members were

¹ 1 East P. C. 402; 1 Bish. New Cr. Law, § 875; Carroll v. S., 23 Ala. 28; S. v. Patterson, 45 Vt. 308.

² Hendrix v. S., 50 Ala. 148; 3 Bl. Com. 4. Compare *ante*, §§ 66, 168.

³ *Ante*, §§ 28 et seq.

⁴ Rex v. Gill, 1 Str. 190, M. 526; 1 Russ. on Crimes (5th ed.), 962.

⁵ Dickenson v. S., 24 Tex. App. 121, 5 S. W. 648.

⁶ Howard v. C., 26 Ky. L. R. 465, 81 S. W. 689 (*semble*).

⁷ 4 Bl. Com. 205.

included a finger,¹ an eye,² a foretooth, and those parts which are supposed to give courage. But cutting off the ear or the nose is not mayhem at common law, since the loss of these tends only to disfigure, but not to weaken.³ It has been held that a statutory mayhem, based on the common law offence, is not committed by cutting the throat,⁴ or breaking the skull,⁵ there being no deprivation of any member. The injury must be permanent in order to constitute the offence.⁶ Under the statute, however, in Texas, the fact that the injured member, having been put back, grew again in its proper place, was no defence.⁷ The offence is now almost universally, in this country, defined by statute, and generally treated as an aggravated assault. In many States the statutes cover cases not embraced by the common law, as the biting off an ear or the slitting of the nose, if the injury amounts to a disfigurement.⁸

Mayhem, at common law, was punishable in some cases as a felony, — an eye for an eye, and a tooth for a tooth, — and in others as a misdemeanor.⁹ But if the offence is made a felony in this country, the punishment is defined by statute. It is doubtless, generally, a misdemeanor, unless done with intent to commit a felony.¹⁰

Under the statute in New York, the injury must have been done by “premeditated design” and “of purpose.” Hence, if done as the result of an unexpected encounter, or of excitement produced by the fear of bodily harm, the offence is not committed.¹¹ So under the statute 5 Henry IV, c. 5, malice

¹ *Bowers v. S.*, 24 Tex. App. 542, 7 S. W. 247.

² *Chick v. S.*, 7 Humph. (Tenn.) 161.

³ 4 Bl. Com. 205. See also 2 Bish. New Cr. Law, § 1001, and notes.

⁴ *Rex v. Lee*, 1 Leach, 3d ed. 61.

⁵ *Foster v. P.*, 50 N. Y. 598, M. 529.

⁶ *S. v. Briley*, 8 Porter (Ala.), 472.

⁷ *Slattery v. S.*, 41 Tex. 619.

⁸ *S. v. Girkin*, 1 Ired. (N. C.) 121; *S. v. Ailey*, 3 Heisk. (Tenn.) 8.

⁹ 4 Bl. Com. 205; *C. v. Newell*, 7 Mass. 245, C. 109, 482. Compare *Adams v. Barratt*, 5 Ga. 404; *S. v. Thompson*, 30 Mo. 470; *Canada v. C.*, 22 Grat. (Va.) 899.

¹⁰ *Ibid.*; Stephen's Dig. Cr. Law, cc. 25 and 26.

¹¹ *Godfrey v. P.*, 63 N. Y. 207.

prepnese was said by Lord Coke to mean "voluntarily and of set purpose."¹ But in North Carolina, where the statute prescribes the act done "on purpose and unlawfully, but without malice aforethought," it has been held that the intent to disfigure is *prima facie* to be inferred from an act which does in fact disfigure, and it is not necessary to prove a preconceived intention to disfigure.²

HOMICIDE.

§ 218. **Homicide** is the killing of a human being. It may be *lawful*, as when one shoots an enemy in war, or the sheriff executes another in pursuance of the mandate of the court, or kills a prisoner charged with felony in the effort to prevent his escape, and hence called *justifiable* homicide, in contradistinction to *excusable* homicide, or a homicide committed in protecting one's person or the security of his house.

Justifiable Homicide.³—In addition to the illustrations already given, it may be said, generally, that wherever, in the performance of a legal duty, it becomes necessary to the faithful and efficient discharge of that duty to kill an assailant or fugitive from justice, or a riotous or mutinous person, or where one interposes to prevent the commission of some great and atrocious crime, amounting generally, though not necessarily, to felony, and it becomes necessary to kill to prevent the consummation of the threatened crime,⁴—in all these cases the homicide is justified on the ground that it is necessary, and in the interest of the safety and good order of society. But homicide can never be justifiable, except when it is strictly lawful and necessary. The soldier who shoots his adversary must strictly

¹ Coke, 3 Inst. 62. See also *Godfrey v. P.*, *ante*; *Molette v. S.*, 49 Ala. 18; *S. v. Jones*, 70 Ia. 505, 30 N. W. 750; *S. v. Cody*, 18 Or. 506, 23 P. 891, 24 P. 895.

² *S. v. Girkin*, 1 Ired. (N. C.) 121. See also *S. v. Simmons*, 3 Ala. 497; *Carpenter v. P.*, 31 Col. 284, 72 P. 1072; *U. S. v. Gunther*, 5 Dak. 234, 38 N. W. 79; *S. v. Hair*, 37 Minn. 351, 34 N. W. 893; *Terrell v. S.*, 86 Tenn. 523, 8 S. W. 212.

³ See 16 Harvard Law Review, 567.

⁴ *U. S. v. Wiltberger*, 3 Wash. C.C. 515, Fed. Cas. No. 16,738.

conform to the laws of war;¹ and the sheriff who executes a prisoner must follow the mode prescribed by his warrant.²

The distinction between justifiable and excusable homicide rested, in the early common law, upon the fact that the latter was punishable by the forfeiture of goods, while the former was not punishable at all.³ It long since, however, became very shadowy, and has now an interest rather historical than practical, — the verdict of not guilty being returned whenever the circumstances under which the homicide takes place constitute either a justification or an excuse.⁴

§ 219. **Human Being. Time. Suicide.** — In order to constitute homicide, the killing must be of a person in being; that is, born and alive. If the killing be of a child still unborn, though the mother may be in an advanced state of pregnancy,⁵ or if the child be not wholly delivered,⁶ or if the child be born, and it is not made affirmatively to appear that it was born alive, it is no homicide.⁷ Death, however, consequent on exposure, after premature birth alive, unlawfully procured, is criminal homicide.⁸

It is also a rule of the common law, valid, no doubt, at the present day, that the death must happen within a year and a day after the alleged crime; otherwise it cannot be said, — such was the reasoning, — to be consequent upon it.⁹ In the computation of the time, the whole day on which the hurt was received is reckoned the first.¹⁰

Deliberate suicide is self-murder, and, though the person

¹ *S. v. Gut*, 13 Minn. 341; 4 Bl. Com. 198.

² 1 Hale P. C. 433.

³ 1 Hawk. P. C. (8th ed.) 79 et seq.

⁴ 4 Bl. Com. 186.

⁵ 1 Russell on Crimes (5th ed.), 645; *Evans v. P.*, 40 N. Y. 86.

⁶ *Rex v. Poulton*, 5 C. & P. 329; *Rex v. Sellis*, 7 C. & P. 850. Compare *Reg. v. Reeves*, 9 C. & P. 25; *S. v. Winthrop*, 43 Ia. 519.

⁷ *Rex v. Brain*, 6 C. & P. 349. M. 554; *U. S. v. Hewson*, 7 Law Reporter (Boston), 361, Fed. Cas. No. 15,360.

⁸ *Reg. v. West*, 2 C. & K. 784, M. 565.

⁹ Coke's Third Inst. p. 33; *P. v. Kelly*, 6 Cal. 210; *S. v. Shepherd*, 8 Ired. (N. C.) 195.

¹⁰ 1 Russell on Crimes (5th ed.), 673.

who commits suicide, is of course, not punishable, one who advises, and, being present, aids and abets another to commit suicide, is guilty of murder.¹ So, also, one who kills another at his request is as guilty of murder as if the act had been done merely of his own volition.²

§ 220. **Murder.** — Of unlawful homicides, *murder* is the most criminal in degree, and consists in the unlawful killing of a human being with malice aforethought; as when the deed is effected by poison knowingly administered, or by lying in wait for the victim, or in pursuance of threats previously made, and, generally, where the circumstances indicate design, preparation, intent, and hence previous consideration.³

§ 221. **Malice, Express and Implied.**⁴ — This malice may be *express*, as where antecedent threats of vengeance or other circumstances show directly that the criminal purpose was really entertained; or *implied*, as where, though no expressed criminal purpose is proved by direct evidence, it is indirectly but necessarily inferred from facts and circumstances which are proved.

Where the killing can only be accounted for on the supposition of design or intent, the law conclusively implies malice; or, in other words, the courts instruct the jury that, certain facts being proved, malice is to be implied. And malice is implied by the law when, though no personal enmity may be proved, the perpetrator of the deed acts without provocation or apparent cause, or in a deliberately careless manner, or with a reckless and wicked hostility to everybody's rights in general, or under such circumstances as indicate a wicked, depraved, and malignant spirit;⁵ and so where a deadly weapon is used.⁶ So one who is engaged in any felony

¹ *Rex v. Dyson*, Russ. & Ry. 523; *Rex v. Abbott*, 67 J. P. 171; *C. v. Bowen*, 13 Mass. 356, K. 91, M. 555.

² 1 Hawk. P. C. (8th ed.) 78; *Blackburn v. S.*, 23 O. St. 146.

³ 4 Bl. Com. 195; *C. v. Webster*, 5 Cush. (Mass.) 295, 316.

⁴ *Ante*, § 33.

⁵ *Rex v. Halloway*, Cro. Car. 131, K. 103, M. 593; *S. v. Capps*, 134 N. C. 622, 46 S. E. 730; *S. v. Smith*, 2 Strobr. (S. C.) 77; 4 Bl. Com. 198; 2 Bish. New Cr. Law, §§ 680 et seq.

⁶ *S. v. Musick*, 101 Mo. 260, 14 S. W. 212.

or other crime of violence, or resisting a lawful arrest, where he commits homicide even accidentally, is guilty of murder. It is generally said in these cases that the law implies the malice from the fact of the killing.¹ It has, however, been said, particularly in the cases of killing in the course of another felony or by a dangerous weapon, that while the fact of the killing under these circumstances is strong evidence from which the existence of malice, in the legal sense, may be found, it should be nevertheless a question of fact for the jury.²

Whatever view may be taken as to the sufficiency of the evidence to establish malice and who is the proper body to determine its existence, it is generally agreed that under the modern statutes defining murder in the first degree, as well as at common law, this implied malice is effectual to constitute murder in the first degree, all doubts as to guilt of the higher degree being resolved in favor of the prisoner and of the lower degree.³

§ 222. **Malice Aforethought.** — It is not necessary that the design, preparation, or intent which constitutes malice aforethought should have been entertained for any considerable period of time prior to the killing. It is enough to constitute this sort of malice that a conscious purpose, design, or intent to do the act should have been completely entertained, for

¹ As to killing with dangerous weapon see, in addition to cases *ante*, p. 212, notes 5 and 6: *Grey's Case*, Kel. 64, K. 105, M. 400; *Hadley v. S.*, 55 Ala. 31. As to killing in resisting arrest see 1 *Russ. Crimes*, 5th ed. 723 et seq.; *Yong's Case*, 4 Coke, 40a; *Rex v. Tomson*, Kel. 66; *Rex v. Ford*, R. & R. 329; *Reg. v. Porter*, 12 Cox C. C. 444; *Dilger v. C.*, 88 Ky. 550, 11 S. W. 651; *P. v. Carlton*, 115 N. Y. 618, 22 N. E. 257; *Brooks v. C.*, 61 Pa. 342; *Angell v. S.*, 36 Tex. 542. As to killing in the course of a felony of violence see *Rex v. Plummer*, Kel. 109; *Errington's Case*, 2 Lewin, 217, K. 104; *Rex v. Horsey*, 3 F. & F. 287, K. 109, M. 599.

² *Reg. v. Serné*, 16 Cox, C. C. 311, C. 183, K. 106, M. 600; *Farris v. C.*, 14 Bush (Ky.), 362; *S. v. Greenleaf*, 71 N. H. 606, 54 Atl. 38. See also 1 *Wharton Cr. L.*, 10th ed., §§ 320, 321; 2 *Bish. New Cr. L.*, 8th ed., §§ 680 et seq.; *Reg. v. Greenwood*, 7 Cox C. C. 404, M. 566.

³ *Wharton*, *Homicide* (2d ed.), §§ 660-664, and cases there cited. See also *P. v. Suesser*, 142 Cal. 354, 75 P. 1093; *Wheatly v. C.*, 26 Ky. L. R. 436, 81 S. W. 687.

however limited a period prior to its execution.¹ Yet in Pennsylvania, where deliberate premeditation is made a necessary characteristic of murder in the first degree, it seems to be held that those words imply something more than malice aforethought.²

§ 223. **Imputed Malice.** — The malice required for murder need not be actual malice against the victim. One who, intending to kill A, kills B, is guilty of murder;³ as, for instance, where he places poison in the way of an enemy, and a friend takes it and dies.⁴ So one who has a murderous intention, not however directed against individuals, as one who fires into a crowd intending to kill, is guilty of murder.⁵

§ 224. **Presumptive Malice.** — It was formerly held that every homicide is to be presumed to be of malice aforethought, unless it appears from the circumstances of the case, or from facts shown by the defendant in explanation, that such malice does not exist.⁶ But the better doctrine now is, doubtless, in accordance with the dissenting opinion of Mr. Justice Wilde, in the case just cited, that when the facts and circumstances attendant upon the killing are equivocal, and may or may not be malicious, it is for the government to show that they are malicious; otherwise, the defendant is entitled to the most favorable construction of which the facts will admit. If, for instance, two persons are in a room together, and one is seen to emerge therefrom holding a knife in his hand, leaving behind him the other dead, and wounded in such a manner that it is certain that the death must have been caused by the

¹ *P. v. Williams*, 43 Cal. 344; *P. v. Suesser*, 142 Cal. 354, 75 P. 1093; *C. v. Webster*, 5 Cush. (Mass.) 295; *P. v. Clark*, 3 Seld. (N. Y.) 385; *S. v. Hunt*, 134 N. C. 648, 47 S. E. 49; *Shoemaker v. S.*, 12 O. 43.

² *Jones v. C.*, 75 Pa. 403. Compare *C. v. Drum*, 58 Pa. 1, M. 607. See also *Leighton v. P.*, 88 N. Y. 117, C. 191; *Atkinson v. S.*, 20 Tex. 522; *Cupps v. S.*, 120 Wis. 504, 97 N. W. 210, 98 N. W. 516.

³ *McGehee v. S.*, 62 Miss. 772.

⁴ *Saunders's Case*, 2 Plowd. 473, C. 176, K. 81, M. 490; *Gore's Case*, 9 Co. 81 a, C. 182, M. 557.

⁵ *S. v. Gilman*, 69 Me. 163. See *ante*, §§ 28, 32, 34.

⁶ *C. v. York*, 9 Met. (Mass.) 93, Mr. Justice Wilde dissenting; *C. v. Webster*, 5 Cush. (Mass.) 295, 316.

knife in the hand of the person who is seen to emerge, yet, as the homicide may have been murder, manslaughter, or in self-defence, it is for the government to produce evidence that it was the former, before it will be entitled to a verdict of guilty of murder; and it cannot rely for such verdict upon the mere presumption that, the killing being shown without explanation, it was malicious.¹ The law does not presume the worst of several possible solutions against the prisoner; it rather presumes that that state of facts is the true one which would be most favorable to him.²

§ 225. **Degrees of Murder.**—Formerly murder, the least as well as the most atrocious, was punished by death. Now, however, in many of the States, murder has by statute been made a crime punishable with greater or less severity, according to the circumstances of atrocity under which it is committed,—death being inflicted only in the most atrocious cases. Hence the different degrees of murder of which the books speak. Manslaughter has also, by the statutes of some of the States, its several degrees, founded upon the same principle of greater or less depravity, indicated by the attendant circumstances. These several statutes are held not to have changed the form of pleading at common law; but the jury are to find the crime as of the degree which the facts warrant, the court instructing them that such and such facts, if proved, would show the crime to be of a particular degree. Nor have those statutes changed the rules of evidence. Yet, in considering cases decided in these States, it is worth while to consider that in matters of definition the common law of murder may have been modified, so that, in determining what is murder and what manslaughter at common law, these cases are not always safe guides.³

¹ See Bennett & Heard's Leading Cr. Cas., Vol. I, p. 322; Whart. Hom. (2d ed.), §§ 664, 669; *P. v. Woody*, 45 Cal. 289; *S. v. Porter*, 34 Ia. 131; *Stokes v. P.*, 53 N. Y. 164.

² *Read v. C.*, 22 Grat. (Va.) 924; *U. S. v. Mingo*, 2 Curtis C. C. 1, Fed. Cas. No. 15,781.

³ *Davis v. S.*, 39 Md. 355; *Green v. C.*, 12 All. (Mass.) 155. In Ohio there are no crimes at common law, *Smith v. S.*, 12 O. St. 466.

Where the statute makes punishable as murder in the first degree a homicide occurring during the commission of another felony of violence, it is sufficient if the killing is done during any stage of the first crime.¹

§ 226. **Manslaughter** is any unlawful killing without malice aforethought; as when one strikes his wife, and death results from the blow, though not intended,² or kills another in a fight arising upon a sudden quarrel,³ or upon mutual agreement,⁴ or in the heat of passion, or upon great provocation.⁵

Every unlawful homicide is either murder or manslaughter, and whether it is one or the other depends upon the presence or absence of the ingredient of malice.⁶

Manslaughter may be *voluntary* or *involuntary*. Voluntary manslaughter is when the act is committed with a real design to kill, but under such circumstances of provocation that the law, in its tenderness for human frailty, regards them as palliating the criminality of the act to some extent.

Involuntary manslaughter is when one causes the death of another by some unlawful act, but without the intention to take life.⁷

§ 227. **Mitigating Circumstances.** — What are the circumstances of provocation which reduce this crime from murder to manslaughter it is not easy to define. It seems to be agreed that no words, however opprobrious, and no trespass to lands or goods, however aggravating, will be sufficient.⁸ To mitigate a murder to manslaughter, the excited and angry condition of

¹ *S. v. Greenleaf*, 71 N. H. 606, 54 Atl. 38; *S. v. Brown*, 7 Or. 186, M. 611.

² *C. v. McAfee*, 108 Mass. 458.

³ *S. v. Massage*, 65 N. C. 480.

⁴ *Gann v. S.*, 30 Ga. 67.

⁵ *S. v. Murphy*, 61 Me. 56; *C. v. Webster*, 5 Cush. (Mass.) 295; *Preston v. S.*, 25 Miss. 383; *Holly v. S.*, 10 Humph. (Tenn.) 141; *Maria v. S.*, 28 Tex. 698.

⁶ *C. v. Webster*, *ante*; *Read v. C.*, 22 Grat. (Va.) 924.

⁷ *C. v. Webster*, *ante*.

⁸ *Reg. v. Mawgridge*, 17 How. St. Tr. 57, Kel. 119, M. 613; *Morley's case*, Kel. 53; *Taylor v. S.*, 48 Ala. 180; *Wilson v. S.*, 140 Ala. 43, 37 So. 93; *P. v. Kelly*, 113 N. Y. 647, 21 N. E. 122.

the person committing the act must proceed from some cause which would naturally and instantly produce in the minds of men, as ordinarily constituted, a high degree of exasperation. Otherwise, a high-tempered man, who habitually indulges his passion, would be entitled to the same consideration as one who habitually controls his passion. The law seeks to arrive at such a result as will lead men to cultivate habits of restraint rather than indulgence of their passions. Hence the question ordinarily is not so much whether the party killing is actually under the influence of a great passion, as whether such a degree of passion might naturally be expected had he exercised such self-control as a due regard to the rights, and a due consideration of the infirmities, of others, in the interest of public safety, require. There must also be a reasonable proportion between the mode of resentment and the provocation.¹

On the other hand, a blow in the face may be a sufficient provocation.² So it is well settled that if the husband detects the wife in adultery a killing of either the woman or her paramour will be but manslaughter if done under the influence of the passion aroused thereby ;³ and it is enough if the circumstances are so suspicious that the belief of the husband is a reasonable one.⁴ While it is the general rule, as stated above, that words alone, no matter how insulting or opprobrious, will not amount to a sufficient provocation, yet it has also been held that where the adultery of the wife is brought home to the husband, not by sight, but by words, the provo-

¹ *Reg. v. Welsh*, 11 Cox C. C. 336; *Flanagan v. S.*, 46 Ala. 703; *P. v. Butler*, 8 Cal. 435; *C. v. Webster*, 5 Cush. (Mass.) 295; *Preston v. S.*, 25 Miss. 383; *S. v. Starr*, 38 Mo. 270; *Fralich v. P.*, 65 Barb. (N. Y.) 48; *Nelson v. S.*, 10 Humph. (Tenn.) 518.

² *Reg. v. Stedman*, Foster C. L. 292.

³ *Rex v. Maddy*, 1 Ventris, 158, K. 111; *Pearson's case*, 2 Lewin C. C. 216; *Jones v. P.*, 23 Col. 276, 47 P. 275; *Mays v. S.*, 88 Ga. 399, 14 S. E. 560; *Rowland v. S.*, 83 Miss. 483, 35 So. 826. Compare *Lynch v. C.*, 77 Pa. 205; *S. v. Hockett*, 70 Ia. 442, 30 N. W. 742.

⁴ *S. v. Yanz*, 74 Conn. 177, 50 Atl. 37, M. 631; *Canister v. S.* (Tex.), 79 S. W. 24.

cation is equally great, since it is not the character of the words in themselves but the information that they convey, that arouses the anger.¹ Of course if there is a sufficient cooling time between the receipt of the information and the killing, the crime is murder.²

§ 228. **Provocation.**—The homicide is not entitled to this reduction in the degree of its criminality, unless it be done under the influence of the provocation. If it be done under its cloak, it will not avail to excuse to any extent. If it can be reasonably collected from the weapon made use of, or from any other circumstances, that there was a deliberate attempt to kill, or to do some great bodily harm, such homicide will be murder, however great may have been the provocation.³ Nor does provocation furnish any extenuation, unless it produces passion.⁴ And seeking a provocation through a quarrel or otherwise, or going into a fight dangerously armed and taking one's adversary at unfair advantage, is such evidence of malice as to deprive the guilty party of all advantage of the plea of provocation.⁵ Where two parties, as in the case of a duel, enter into a conflict deliberately, and death ensues to either, it is murder by the other; while the same result, if the conflict be sudden and in hot blood, is but manslaughter.⁶

Upon this point, also, the fact that the injured party is greatly the inferior of his assailant, — as if he be a child, or woman, or a man physically or mentally enfeebled, — is an important element in determining how much is to be de-

¹ *Reg. v. Rothwell*, 12 Cox C. C. 145; *Maher v. P.*, 10 Mich. 212; *S. v. Grugin*, 147 Mo. 39, 47 S. W. 1058, M. 625; *contra*: *Reed v. S.*, 62 Miss. 405; *S. v. Neville*, 6 Jones (N. C.), 423.

² *Sawyer v. S.*, 35 Ind. 80; *Hardcastle v. S.*, 36 Tex. Cr. R. 555, 38 S. W. 186; *post*, § 228.

³ 1 Russell on Crimes, 5th ed., 688, 690; *Felix v. S.*, 18 Ala. 720; *Henning v. S.*, 106 Ind. 386, 6 N. E. 803; *S. v. Hicks*, 178 Mo. 433, 77 S. W. 539; *P. v. Austin*, 1 Parker C. C. (N. Y.) 154; *S. v. Ellick*, 60 N. C. 450; *S. v. Cheatwood*, 2 Hill (S. C.), 459.

⁴ *S. v. Johnson*, 1 Ired. (N. C.) 354.

⁵ *Price v. S.*, 36 Miss. 531; *S. v. Hildreth*, 9 Ired. (N. C.) 429.

⁶ *Rex v. Ayes*, R. & R. 167, K. 113; *S. v. Underwood*, 57 Mo. 40; *U. S. v. Mingo*, 2 Curtis C. C. 1, Fed. Cas. No. 15,781.

ducted from the criminality of the offence on the score of provocation.¹

And however great may have been the provocation, if sufficient time and opportunity have transpired to allow the aroused passions to subside, or the heated passions to cool, death afterwards inflicted is murder, whether the passions have subsided or the heated blood cooled or not; and it is a question of law for the court to say whether that time has elapsed.² In other jurisdictions, however, it has been said that the question of the reasonableness of the provocation, and the question whether the passions should have cooled, are in their nature questions of fact, and, as such, should be left to the decision of the jury.³

§ 229. **Provocation. Unlawful Arrest.** — But there are cases where the provocation does not produce that heated passion of which we have just been speaking, and where, although the homicide be deliberately committed, and is not shown to be necessary, the act is held by the law to be manslaughter, and not murder. Thus it has been held, in some cases, that, where an unlawful arrest is attempted or made, the party pursued or arrested may kill his assailant, either in resistance to the arrest or in the attempt to escape, although the act be done under such circumstances as would equal or surpass, in point of atrocity and moral turpitude, many cases recognized as murder.⁴

This doctrine, however, does not meet with universal approval, and it is held in other cases that the mere fact that an attempted arrest is unlawful does not necessarily reduce the killing of the officer to manslaughter. In this case, the

¹ *C. v. Mosler*, 4 Barr (Pa.), 264.

² *Rex v. Hayward*, 6 C. & P. 157; *Jarvis v. S.*, 138 Ala. 17, 34 So. 1025; *Beauchamp v. S.*, 6 Blackf. (Ind.) 299; *S. v. Moore*, 69 N. C. 267; *S. v. McCants*, 1 Speer (S. C.), 384, M. 621.

³ *S. v. Gardner*, 1 Houst. Crim. Rep. (Del.) 146; *Ferguson v. S.*, 49 Ind. 33 (*semble*); *Maher v. P.*, 10 Mich. 212; *S. v. Grugin*, 147 Mo. 39, 47 S. W. 1058, M. 625; *Small v. C.*, 91 Pa. 304.

⁴ *Rex v. Thompson*, 1 Moo. C. C. 80, C. 174; *Reg v. Carey*, 14 Cox C. C. 214; *Rafferty v. P.*, 69 Ill. 111; *C. v. Carey*, 12 Cush. (Mass.) 246. Compare *Protector v. Buckner*, Styles, 467.

assailed party may use such reasonable force, and only such, in proportion to the injury threatened, as is necessary to effect his escape. This, however, does not warrant him in the use of a deadly weapon, if he has no reason to apprehend a greater injury than a mere unlawful arrest.¹ Probably the killing in such case, with express malice, would be held to be murder.² And the better rule would seem to be that while, if he uses only a reasonable amount of force to resist the arrest, or if there are circumstances reasonably provoking him to hot blood, and death results, it is manslaughter, the mere fact that the arrest is unlawful is not sufficient so to reduce the offence.³ So, *a fortiori*, when the illegal arrest is not of the defendant but of a third person.⁴ So, in defence of one's own house, or his castle, the law will not justify a killing of the assailant, unless the assault be of such a nature as to threaten death or great bodily harm to the inmate. A mere threatened injury to the house, which does not also threaten the personal safety of the inmates, does not make necessary, and therefore does not justify, the killing of the assailant to prevent the possible injury. A mere trespass upon the property, without a felonious purpose, cannot be repelled by taking the life of the assailant.⁵

§ 230. **The Death Must Be the Direct Result of the Unlawful Act.**—It was formerly held that if a witness by false testimony, with the express purpose of taking life, procure the conviction and execution of a prisoner, this would be murder by the false witness.⁶ But, aside from the fact that the direct connection between the testimony and the execution could in

¹ *Galvin v. S.*, 6 Cold. (Tenn.) 283.

² *Roberts v. S.*, 14 Mo. 138.

³ *Reg. v. Allen*, 17 L. T. Rep. N.S. 222; *Noles v. S.*, 26 Ala. 31; *Keady v. P.* (Col.), 74 P. 892; *Rafferty v. P.*, 72 Ill. 37; *Brown v. S.*, 62 N. J. L. 666, 42 Atl. 811; *Vann v. S.* (Tex.), 77 S. W. 813; *Miller v. S.*, 32 Tex. Cr. R. 319, 20 S. W. 1103.

⁴ *Hugget's Case*, Kel. 59. Compare *Reg. v. Tooley*, 11 Mod. 242; *Rex v. Adey*, 1 Leach, 4th ed. 206.

⁵ *S. v. Patterson*, 45 Vt. 208. See also *Carroll v. S.*, 23 Ala. 28; 1 Russell on Crimes, 5th ed. 685; *post*, § 235.

⁶ *Rex v. McDaniel*, 1 Leach, 4th ed. 44, C. 167, K. 97.

few if any cases be shown with that certainty of proof required in criminal cases, the perils of such a rule would tend to deter honest witnesses from testifying to what they believe to be true. The injury to society, to say nothing of the injustice of such a rule, is so out of proportion to any possible advantage, that modern jurisprudence seems to have discarded it.

So, though one who owes a personal public duty may incur criminal responsibility by neglecting it, yet where road commissioners, whose duty it was to keep a road in repair, with power to contract, neglected to contract, and suffered the road to become out of repair, it was held that, when injury resulted from the want of repair, neglect to contract was not the cause of the injury, in such a sense as to be imputable to their neglect.¹ So where the defendant keeps fireworks in his house and they are, solely by the negligence of his servants, caused to explode and so kill a person, he is not responsible for the death.²

Where death follows a wound adequate to produce it, the wound will be presumed to be the cause, unless it be shown that the death was solely the result of some other cause, and not of the wound.³ The wound being an adequate, primary, or contributory cause of the death, the intervention of another cause, preventing possible recovery or aggravating the wound, will not relieve the defendant. If death be caused by a dangerous wound, or from a disease produced by the wound, gross ignorance or carelessness of the deceased and his attendants in its treatment does not relieve the party who inflicted the wound from responsibility.⁴ Death from a cause independent of the wound will,⁵ as where A knocks B down and the latter is killed, not by the blow, but by a horse kicking him.⁶ But it will be no excuse to show that, if proper treatment had been

¹ *Reg. v. Pocock*, 17 Q. B. 34.

² *Reg. v. Bennett*, Bell 1, M. 567.

³ *Parsons v. S.*, 21 Ala. 300; *C. v. Hackett*, 2 All. (Mass.) 136; *Crum v. S.*, 64 Miss. 1, 1 So. 1; and see, *ante*, §§ 24 et seq.

⁴ *Bowles v. S.*, 58 Ala. 335; *Kee v. S.*, 28 Ark. 155.

⁵ *C. v. Hackett*, *ante*; *C. v. Costley*, 118 Mass. 1; *S. v. Scates*, 5 Jones (N. C.), 420.

⁶ *P. v. Rockwell*, 39 Mich. 503.

had, the death would not have ensued.¹ Mortal illness, either from a prior wound or other cause, is no excuse for one who produces death by another independent wound or other source,² though it has been said that, if death is the result of prior fatal disease, hastened by a wound, the person inflicting the wound is not responsible for the death.³ It is also said that it is not murder to work on the imagination so that death ensues, or to excite the feelings so as to produce a fatal malady.⁴ But it is apprehended that if the death be traceable to the acts done as the direct and primary cause, and if it can be shown that the acts done were done for the purpose of accomplishing the result, it would be murder. The question must always be whether the means were designedly, or, in the sense of the law, maliciously and successfully used to produce the result. If they were, then the guilt of murder is incurred; otherwise, life might be deliberately taken by some means, with impunity. To frighten one to death deliberately is as much murder as to choke or starve him.⁵ The difficulty of proof that death results from a particular cause constitutes sufficient reason for caution; but if the truth be clear, the law should not fail to attach the penalty.⁶

The defendant is equally responsible for the death where it results, not from the immediate application of force by him but where he could reasonably have foreseen that as a result of his act the second force would be applied. So where one by threats or show of force compels another, acting reasonably, to leap into a river or out of a window in the attempt to escape, the assailant is criminally chargeable with the consequences;⁷ and where a husband by threats or force causes

¹ 1 Hale P. C. 428.

² *P. v. Ah Fat*, 48 Cal. 61; *S. v. O'Brien*, 81 Ia. 88, 46 N. W. 752; *Hopkins v. C.*, 25 Ky. L. R. 2117, 80 S. W. 156.

³ *Livingston v. C.*, 14 Grat. (Va.) 592.

⁴ 1 Hale P. C. 429.

⁵ See 2 Bish. New Cr. Law, §§ 642, 643, and note 2 to § 613; *Reg. v. Towers*, 12 Cox C. C. 530, C. 163, K. 95.

⁶ But see Whart. Hom., §§ 368-372, and notes.

⁷ *Reg. v. Pitts*, Car. & M. 284; *Reg. v. Halliday*, 61 L. T. Rep. 701; *Norman v. U. S.*, 20 App. Cas. D. C. 494.

his wife, in reasonable fear of violence, to leave the house, and being unable to secure shelter, she is frozen to death, as might have been foreseen, the husband is guilty of homicide.¹ So where a mother exposes her child in such a way that it is likely to be injured by wild beasts.² An indictment charging that the prisoner caused the death by some means unknown to the grand jury, and therefore undescribed, is sufficient upon which to find a verdict of guilty of murder, if the case will not admit of greater certainty in stating the means of causing the death.³

Though it was formerly doubted by some distinguished judges, it seems now to be settled that the mere omission to do a positive duty, whereby one is suffered to starve or freeze, or to suffocate or otherwise perish, is manslaughter, if merely heedlessly done; while it is murder, if the omission is with intent to bring about the fatal result.⁴

§ 231. **Unlawfulness.** — The unlawfulness which is a necessary ingredient in the crime of murder or manslaughter may arise out of the mode of doing a lawful act. Thus, if one is engaged in the repair of a building situated in a field away from any street, and where there is no reason to suppose people may be passing, and, being upon the roof, and in ignorance of the fact that any person is below, throws down a brick or piece of timber, whereby one not known or supposed to be there is killed, the act being in itself lawful and unattended with any degree of carelessness, he is guilty of no offence. The death is the result of accident or misadventure. If we suppose the circumstances to be somewhat changed, and the building to be situated upon the highway in a country town, where passengers are infrequent, and the same act is done with the same result, the precaution, however, being taken of

¹ Anon., Y. B. 2 Ed. III, 18 b, K. 92; *Hendrickson v. C.*, 85 Ky. 281, 3 S. W. 166.

² *The Harlot's Case*, Crompt. Just. 24, K. 92. See also *Rex v. Hickman*, 5 C. & P. 151, M. 564; *S. v. Monroe*, 121 N. C. 677, 28 S. E. 547; *Taylor v. S.*, 41 Tex. Cr. R. 564, 55 S. W. 961, M. 575.

³ *C. v. Webster*, 5 Cush. (Mass.) 295.

⁴ *Reg. v. Conde*, 10 Cox C. C. 547, C. 165; *ante*, §§ 30, 31.

first looking to see if any one is passing, and calling out to give warning of danger, the killing would still be by misadventure, and free from guilt, because the act done is lawful and with due care. Yet were the same act to be done in a populous town, where people are known to be continually passing, even though loud warning were to be given, and death should result, it would be manslaughter; and if no warning at all were given, it would be murder, as evincing a degree of recklessness amounting to general malice toward all.¹ So when a parent is moderately correcting his child, and happens to occasion his death, it is only misadventure; for the act of correction is lawful. But if he exceeds the bounds of moderation either in the manner, the instrument used, the quantity of punishment, or in any other way, and death ensues, it is manslaughter at least, and, under circumstances of special atrocity, might be murder.² The same act, therefore, which under certain circumstances would be lawful and proper, and involve no guilt even if death should ensue, might under other circumstances involve the guilt of manslaughter, or even murder.³

The condition of the person ill treated, as where, being in a debilitated condition, he is compelled to render services for which he is for the time being incompetent, is often a controlling circumstance in determining the guilt of the offender.⁴

So, though one is not in general criminally liable for the death of a servant by reason of the insufficiency of food provided, yet if the servant be of such tender age, or of such bodily or mental weakness, as to be unable to take care of himself, or is unable to withdraw from his master's dominion, the master may be criminally responsible.⁵

§ 232. **Negligence. Carelessness.**⁶ — The point at which, in the performance of a lawful act, one passes over into the

¹ 4 Bl. Com. 192.

² 4 Bl. Com. 182.

³ *S. v. Vance*, 17 Ia. 138; *C. v. York*, 9 Met. (Mass.) 93; *S. v. Harris*, 63 N. C. 1; *Ann v. S.*, 11 Humph. (Tenn.) 159.

⁴ *C. v. Fox*, 7 Gray (Mass.), 585; *U. S. v. Freeman*, 4 Mason C. C. 505, Fed. Cas. No. 15,162, M. 561.

⁵ *Reg. v. Smith*, 10 Cox C. C. 82.

⁶ *Ante*, §§ 29-31.

region of unlawfulness is so uncertain, the line of demarcation is so shadowy, that it has been, and from the very nature of the case must continue to be, a most prolific source of legal controversy. It is often said that the negligence or carelessness must be so gross as to imply a criminal intent; but the question still remains as to when it reaches that point, and no rule by which to test it has been or can be given. Each particular case must be determined upon its particular circumstances; and precedents, though multitudinous, are so generally distinguishable by some special circumstance, that in a given case they seldom afford any decisive criterion, though in many instances they may afford substantial aid.¹ Self-defence is lawful, but, if carried beyond the point of protection, it becomes in its turn an assault, unlawful and criminal. If a man has a dangerous bull and does not tie him up, but leaves him at liberty, according to some opinions, says Hawkins, he is guilty of murder;² but certainly of a very gross misdemeanor, if a man is gored to death by the bull.³ On the other hand, says Mr. Justice Willes, if the bull be put by the owner into a field where there is no footpath, and some one else let the bull out, and death should ensue, the owner would not be responsible. Yet, doubtless, guilt or innocence, and the degree of guilt, would depend upon what, under all the circumstances, the owner had reason to believe might be the result of his act, whether or not it would be inappreciably, appreciably, or in a higher degree hazardous to the lives of others. And this again would depend upon a variety of circumstances;—as the degree of viciousness of the bull; the time, whether day or night, when he might be put in the field; the probability that he might be let out, or that some one would pass through the field; the size of the field; its nearness to or remoteness from a populous neighborhood; and many others which might be suggested, but which cannot be foreseen or properly estimated except in their relation to other concomitant circumstances.⁴

¹ See *Reg. v. Shepherd*, L. & C. 147.

² 1 P. C. (8th ed.) 92.

³ *Reg. v. Spencer*, 10 Cox C. C. 525.

⁴ See, for cases illustrative upon this point, the valuable and elaborate

Carelessness in a physician, whether licensed or unlicensed, may be criminal, if it be so gross and reckless as amounts to a culpable wrong, and shows an evil mind;¹ but if he make a mistake merely, it is not criminal.²

And it seems that gross ignorance may be criminal;³ and that, though the intent be good, one who is not a regularly educated physician has no right to hazard medicine of a dangerous character unless it be necessary.⁴ But this, doubtless, would depend upon the intent, degree of intelligence, and other circumstances. Reckless disregard of consequences would be criminal in a regularly educated physician, while the best efforts of a pretender, made in good faith and in an emergency, would be entirely free from fault.⁵ And if a man voluntarily undertakes to perform the duties of a position to which he is unsuited by his ignorance, he cannot avail himself of the plea of ignorance as an excuse. It was so held in the case of an engineer of a steamboat.⁶

§ 233. **Neglect of Duty.** — The refusal or omission to act, when legal duty requires, may be as criminal as an act positively committed. Thus, where it was the duty of a miner to cause a mine to be ventilated, and he neglected to do it, and as a consequence the fire-damp exploded, causing the death of several persons, this was held criminal,⁷ and it would be murder if the result was intended.⁸ So an engineer, by whose omission of duty an explosion takes place⁹ or a railway train runs off the track,¹⁰ or any person bound to protect, note of Judge Bennett to *Rex v. Hull*, Kel. 40, K. 125, in 1 *Leading Cr. Cas.* 50.

¹ *Reg. v. Spencer*, 10 Cox C. C. 525; *Rex v. Van Butchell*, 3 C. & P. 629; *Rice v. S.*, 8 Mo. 561.

² *Reg. v. Chamberlain*, 10 Cox C. C. 486, C. 172; *S. v. Hardister*, 38 Ark. 605.

³ *Rex v. Spiller*, 5 C. & P. 333.

⁴ *Simpson's Case*, 1 Lewin, 172.

⁵ *C. v. Thompson*, 6 Mass. 134; 1 Hawk. P. C. (8th ed.) 104.

⁶ *U. S. v. Taylor*, 5 McLean C. C. 242, Fed. Cas. No. 16,441.

⁷ *Reg. v. Haines*, 2 C. & K. 368.

⁸ *Reg. v. Conde*, 10 Cox C. C. 547.

⁹ *U. S. v. Taylor*, *ante*.

¹⁰ *Reg. v. Bengel*, 4 F. & F. 504.

succor, or support who neglects his duty, whereby death ensues, is criminally liable.¹

§ 234. **Self-defence.**² **Necessity.** — The limitations to the exercise of the right of self-defence have already been stated under the title of Assault. To what has there been said it should be here added that it was the ancient, and by the weight of authority it is the modern, doctrine that before the assaulted party will be justified in availing himself of such means of self-defence as menace the life of his assailant, he must retreat, except perhaps in defence of his dwelling-house,³ if it can be done with safety. He must not avail himself of the right to kill his assailant, if he can escape the extreme necessity with safety to himself. The point of honor, that retreating shows cowardice, is of less public concern than would be the extension of the right to take the life of another beyond the limit of clear necessity.⁴ Perhaps the tendency of modern decisions is toward less strictness in requiring the assailed party to retreat, and to hold that a man who entirely without fault is feloniously assaulted may kill his assailant, without first attempting to avoid the necessity by retreating, it being possible to retreat with safety.⁵

But the necessity which excuses homicide in self-defence is not a justification of the party who seeks and brings on the quarrel out of which the necessity arises.⁶ He cannot excuse

¹ *Reg. v. Mabbett*, 5 Cox C. C. 339; *S. v. Shelledy*, 8 Ia. 477; *S. v. Hoit*, 23 N. H. 355; *S. v. O'Brien*, 32 N. J. L. 169. See also Judge Bennett's note to *Reg. v. Lowe* (3 C. & K. 123, K. 132), in 1 Leading Cr. Cas. 60, where the cases illustrative of this point are very fully collected and stated.

² *Ante*, §§ 63, 64.

³ See *post*, § 235.

⁴ 1 Hale P. C. 481; *Coffman v. C.*, 10 Bush (Ky.), 495; *P. v. Cole*, 4 Parker C. C. (N. Y.) 35; *S. v. Ferguson*, 9 Nev. 106; *S. v. Hoover*, 4 D. & B. (N. C.) 365; *Stoffer v. S.*, 15 O. St. 47; *Vaiden v. C.*, 12 Grat. (Va.) 717; *U. S. v. Mingo*, 2 Curtis C. Ct. (U. S.) 1, Fed. Cas. No. 15,781; *Whart. Hom.*, §§ 485 et seq.

⁵ *Runyan v. S.*, 57 Ind. 80; *Erwin v. S.*, 29 O. St. 186. Compare *ante*, § 64.

⁶ *S. v. Neeley*, 20 Ia. 108; *S. v. Underwood*, 57 Mo. 40; *S. v. Smith*, 10 Nev. 106; *S. v. Hill*, 4 D. & B. (N. C.) 491; *Vaiden v. C.*, *ante*.

himself by a necessity which he has himself created. Nor can he be justified or excused for a homicide done upon the plea of necessity, if the necessity arises from his own fault.¹

§ 235. **Self-defence.**² **Proper Mode.** — And the defence must be not only necessary, but also by appropriate means, — that is to say, in order to excuse a homicide as done in self-defence, it must be made to appear that the taking of the life of the assailant in the mode adopted appeared, upon reasonable grounds, to the person taking, and without negligence on his part, necessary to save himself from immediate slaughter or from great bodily harm, — the actual existence of the danger being immaterial, if such were the appearances to him.³

In defence of property merely as property, homicide is not excusable.⁴ But where a man's house, in so far as it is his asylum or his property, is assailed, and in such a manner that his personal security is threatened, or that of those whom he has the right to protect, and the assault may be said to be in some sense an assault upon him, and to threaten his life, or to do him, or those he has the right to protect, some great bodily harm, it will be held excusable. But the excuse rests upon the fact that personal injury is threatened. The law does not allow human life to be taken except upon necessity. You may kill to save life or limb; to prevent a great and atrocious crime, — a felony open and forcible; and in the discharge of a legal public duty. But one man cannot be excused

¹ *P. v. Lamb*, 17 Cal. 323; *Cox v. S.*, 64 Ga. 374; 1 Hawk. P.C. (8th ed.) 79.

² *Ante*, § 64.

³ *P. v. Lombard*, 17 Cal. 216; *Coffman v. C.*, 10 Bush (Ky.), 495; *S. v. Chopin*, 10 La. Ann. 458; *Hurd v. P.*, 25 Mich. 405; *S. v. Sloane*, 47 Mo. 604; *S. v. Harris*, 59 Mo. 550; *Yates v. P.*, 32 N. Y. 509; *Stewart v. S.*, 1 O. St. 66; *Darling v. Williams*, 35 O. St. 58; *C. v. Drum*, 58 Pa. 9; *Pistorius v. C.*, 84 Pa. 158; *Munden v. S.*, 37 Tex. 353; *U. S. v. Mingo*, 2 Curtis C. C. 1, Fed. Cas. No. 15,781. This we think to be the law, by the weight of authority. But there are cases to the contrary. The cases are collected and thoroughly discussed in Wharton, Homicide, §§ 493 et seq.

⁴ *Ante*, §§ 66, 67.

for intentionally killing another for a mere trespass upon his property.¹

It is said in some cases, that, if a man be assaulted in his dwelling-house, he is not bound to retreat in order to avoid the necessity of killing his assailant, and that an assault upon one in his dwelling-house is thus distinguished from an assault upon him elsewhere.² This assault in one's dwelling-house may be in some sense an assault upon the person actually in charge.³

§ 236. **Struggle for Life.**⁴ — Blackstone⁵ approves the case, put by Lord Bacon, of two persons being at sea upon a plank which cannot save both, and one thrusting the other off, as a case of excusable homicide. But it is difficult to see where one gets the right to thrust the other off. The right of self-defence arises out of an unlawful attack made on one's personal security, not out of accidental circumstances, which, whether threatening or not to the life of one or more persons, are in no way attributable to the fault, or even the agency, of either. Two men may, doubtless, under such circumstances struggle for the possession of the plank until one is exhausted; but neither can have the right to shoot the other to make him let go, because no right of him who shoots is invaded.

§ 237. **Accident.** — Homicide is also excusable where it happens unexpectedly, without intention, and by accident, or, as the old law has it, by misadventure in the performance of a lawful act in a proper manner; as where one is at work with a hatchet and its head flies off and kills a bystander;⁶ so if a physician, in good faith, prescribes a certain remedy, which, contrary to expectation and intent, kills instead of

¹ *S. v. Vance*, 17 Ia. 138; *S. v. Underwood*, 57 Mo. 40; *S. v. Patterson*, 45 Vt. 308; 1 Bish. Cr. Law, § 857, and cases there cited; *ante*, § 229; *post*, § 239; Whart. Hom., §§ 414 et seq.

² *Bohannon v. C.*, 8 Bush (Ky.), 481; *Pond v. P.*, 8 Mich. 150; *S. v. Martin*, 30 Wis. 216.

³ *S. v. Patterson*, *ante*.

⁴ *Ante*, § 68.

⁵ 4 Bl. Com. 186.

⁶ 4 Bl. Com. 182.

curing.¹ But if the lawful act be performed in so improper a manner as to amount to culpable carelessness, then the homicide becomes manslaughter.²

§ 238. **Accident in the Course of a Game.**³ — Where death ensues from accident in the course of a lawful sport or recreation, it is excusable homicide.⁴ But this excuse will not avail one who is playing a hazardous game, in which the danger of injury is great.⁵ And if a player deliberately goes outside the rules of the game to do an injury, or if while within the rules he does an act that he has reason to suppose will do injury, the fact that he is playing a lawful game will not excuse him.⁶

§ 239. **Prevention of Felony.**⁷ — Homicide in the prevention of felony is not strictly homicide in self-defence, or in the defence of property, but rests upon the duty and consequent right which devolves upon every good citizen in the preservation of order, and is upon these grounds excusable.⁸ Yet not every felony may be thus prevented, but only those open felonies, accompanied by violence, which threaten great public injury not otherwise preventable. Secret felonies, unaccompanied by force, such, for instance, as forgery or secret theft, and offences generally sounding in fraud, cannot be thus prevented.⁹ Even if the crime about to be committed do not amount to a felony, if it be of such forceful character as to be productive of the most dangerous and immediate public consequences, — a riot, for instance, — it is held that death may be inflicted even by a private citizen, if necessary to prevent or suppress it.¹⁰ Indeed, a riot is a sort of general assault upon

¹ 4 Bl. Com. 197.

² Ibid. 192; *ante*, § 231.

³ *Ante*, § 23.

⁴ Foster, Crown Law, 3d ed. 259.

⁵ Foster, Crown Law, 3d ed. 260; Reg. v. Bradshaw, 14 Cox C. C. 83, K. 131.

⁶ Reg. v. Bradshaw, *ante*.

⁷ *Ante*, § 65.

⁸ Pond v. P., 8 Mich. 150.

⁹ S. v. Moore, 31 Conn. 479; S. v. Vance, 17 Ia. 138; Pond v. P., *ante*; Priester v. Angley, 5 Rich. (S. C.) Law, 44.

¹⁰ Patten v. P., 18 Mich. 314.

everybody, and so resistance may be made upon the ground of self-defence.

FALSE IMPRISONMENT.

§ 240. **False Imprisonment**, which consists in the unlawful restraint of the liberty of a person, is an indictable offence at common law.¹ No actual force is necessary. The force of fraud or fear is sufficient. Thus, to stop a person on the highway and prevent him by threats from proceeding, constitutes the offence;² though it has been held in England, by a divided court, that the mere prevention from going in one direction, while there remained liberty of going in any other, is no imprisonment.³ The unlawful confinement of a child by its parents is criminal;⁴ and, no doubt, of a prisoner by a jailer.

Most of the States have now statutes upon the subject under which prosecutions are had.⁵

RAPE.

§ 241. **Rape** is the unlawful carnal knowledge of a woman by force, without her consent.⁶

§ 242. **Carnal Knowledge**.—Carnal knowledge, it is now generally held, both in this country and in England, is accomplished by penetration without emission,⁷ though it was formerly doubted if both were not necessary,—a doctrine still held in Ohio.⁸ And penetration is sufficient, however slight.⁹

¹ *Barber v. S.*, 13 Fla. 675; *C. v. Nickerson*, 5 All. (Mass.) 518; *Redfield v. S.*, 24 Tex. 133; 3 Chitty Cr. Law, 835.

² *Searls v. Viets*, 2 T. & C. (N. Y. S. C.) 224; *Moses v. Dubois*, Dud. (S. C.) 209; *Bloomer v. S.*, 3 Sneed (Tenn.), 66.

³ *Bird v. Jones*, 7 Q. B. 742.

⁴ *Fletcher v. P.*, 52 Ill. 395.

⁵ See Abduction, Kidnapping.

⁶ See *post*, § 244.

⁷ *Waller v. S.*, 40 Ala. 325; *S. v. Hargrave*, 65 N. C. 466; *C. v. Sullivan*, Add. (Pa.) 143; *C. v. Thomas*, 1 Va. Cas. 307; St. 9 Geo. IV, C. 31.

⁸ *Blackburn v. S.*, 22 O. St. 102.

⁹ *Reg. v. Hughes*, 2 Moo. C. C. 190; *P. v. Howard*, 143 Cal. 316, 76 P. 1116; *S. v. Hargrave*, *ante*.

The conclusive presumption of the common law that a boy under the age of fourteen is incapable of committing rape may have been based upon the theory that emission as well as penetration was necessary to the commission of the crime.¹

§ 243. **Force and Violence.** — The force must be such as overcomes resistance, which, when the woman has the power to exert herself,² should be with such vigor and persistence as to show that there is no consent. Any less resistance than with all the might gives rise to the inference of consent.³ But it would seem that this is only an inference of fact, and that the real question is whether the intercourse was without her consent; and so long as it is clear that such was the case, the mere fact that she did not resist to exhaustion would not prevent the crime from being rape.⁴ Where there is no resistance, from incapacity, the only force necessary is the force of penetration. And fraud does not here, as in some other cases, supply the place of force. If the consent be procured, although by fraud, there is no rape.⁵

But here, as with assault, consent to one physical act is no justification for a different one.⁶ So, also, the distinction

¹ *C. v. Green*, 2 Pick. (Mass.) 380. See also the following cases holding the presumption to be conclusive: *Reg. v. Waite*, L. R. 2 Q. B. 600, M. 549; *Chism v. S.*, 42 Fla. 232, 28 So. 399; *S. v. Pugh*, 7 Jones (N. C.), 61; *Foster v. C.*, 96 Va. 306, 31 S. E. 503. In some States the presumption has been held rebuttable by proof of puberty: *Gordon v. S.*, 93 Ga. 531, 21 S. E. 54; *Davidson v. C.*, 20 Ky. L. R. 540, 47 S. W. 213; *P. v. Randolph*, 2 Park. C. R. (N. Y.) 174; *Williams v. S.*, 14 O. 222; *Wagoner v. S.*, 5 Lea (Tenn.), 352. Compare *S. v. Jones*, 39 La. Ann. 935, 3 So. 57.

² See § 244.

³ *P. v. Brown*, 47 Cal. 447; *Taylor v. S.*, 50 Ga. 79; *C. v. McDonald*, 110 Mass. 405; *S. v. Burgdorf*, 53 Mo. 65; *P. v. Dohring*, 59 N. Y. 374.

⁴ *S. v. Shields*, 45 Conn. 256, M. 517; *Austine v. P.*, 110 Ill. 248; *Anderson v. S.*, 104 Ind. 467, 4 N. E. 63.

⁵ *Reg. v. Saunders*, 8 C. & P. 265; *McNair v. S.*, 53 Ala. 453; *Don Moran v. P.*, 25 Mich. 356, M. 539; *S. v. Burgdorf*, *ante*. *Wyatt v. S.*, 2 Swan (Tenn.), 394, C. 206; *Clark v. S.*, 30 Tex. 448. See, however, *contra*, *Reg. v. Dee*, 15 Cox C. C. 579 (Irish), C. 203. In some States intercourse with a married woman by personating her husband has been made rape by statute: *S. v. Williams*, 128 N. C. 573, 37 S. E. 952; *Payne v. S.*, 38 Tex. Cr. R. 494, 43 S. W. 515.

⁶ *Reg. v. Flattery*, L. R. 2 Q. B. D. 410, M. 546.

must be remembered between a mere submission on the one hand, where the will is overpowered, and consent freely given on the other, even though under a misapprehension as to the facts. Where the will is overcome by the force of fear, though there be no resistance, the offence may be committed.¹

§ 244. **Without Consent.**—According to the old definition, the act must be against the will of the woman; but these words are now held to mean without her consent.² If the woman be in a state of insensibility, so that she is incapable of exercising her will, whether that incapacity is brought about by the act of the accused, intentionally or unintentionally, or by the voluntary act of the woman herself, and the ravishment is effected with a knowledge of such incapacity, the offence is committed.³ And the same would be true if the woman were idiotic, insane, or asleep.⁴ Against the will, or without consent, means an active will.

By the law of England, a child under ten years of age is conclusively presumed to be incapable of consenting,⁵ and the same principle has been laid down in this country.⁶ In almost all States the age of consent has been fixed by statute. If the girl is under age the question of her consent is immaterial.⁷

¹ *Reg. v. Woodhurst*, 12 Cox C. C. 443; *Pleasant v. S.*, 13 Ark. 360; *P. v. Burwell*, 106 Mich. 27, 63 N. W. 986; *P. v. Dohring*, 59 N. Y. 374; *Wright v. S.*, 4 Humph. (Tenn.) 194; *Croghan v. S.*, 22 Wis. 444.

² *Reg. v. Fletcher*, 10 Cox C. C. 248; *Reg. v. Barrow*, 11 Cox C. C. 191; *C. v. Burke*, 105 Mass. 376; compare *post*, § 247.

³ *Reg. v. Champlin*, 1 Den. C. C. 89; *Reg. v. Barrett*, 12 Cox C. C. 498; *C. v. Burke*, *ante*.

⁴ *Ibid.*; *Reg. v. Fletcher*, 8 Cox C. C. 131; *Reg. v. Mayers*, 12 Cox C. C. 311, 1 Green's Cr. Law Rep. 317, and note; *Gore v. S.*, 119 Ga. 418, 46 S. E. 671; *S. v. Cunningham*, 100 Mo. 382, 12 S. W. 376. Compare *Crosswell v. P.*, 13 Mich. 427.

⁵ 1 Bl. Com. 212.

⁶ *Gosha v. S.*, 56 Ga. 36; *P. v. McDonald*, 9 Mich. 150. So a girl of twelve, *S. v. Miller*, 42 La. Ann. 1186, 8 So. 309.

⁷ *C. v. Roosnell*, 143 Mass. 32, 8 N. E. 747, C. 212; *P. v. Goulette*, 82 Mich. 36, 45 N. W. 1124; *S. v. Wright*, 25 Neb. 38, 40 N. W. 596; *Farrell v. S.*, 54 N. J. L. 416, 24 Atl. 723; *Loose v. S.*, 120 Wis. 115, 97 N. W. 526. Compare *P. v. Wilmot*, 139 Cal. 103, 72 P. 838. For assault with intent to rape see *ante*, § 208.

ROBBERY.

§ 245. **Robbery** is larceny from the person or personal presence by force and violence and putting in fear.¹

What constitutes larceny, what may be stolen, and what constitutes ownership, that the taking must be felonious, against the will or without the consent of the owner, and with intent to deprive him of his property, will be shown under the title of Larceny.² We are now to consider the additional circumstances which elevate larceny into robbery.

§ 246. **Force and Violence.**—There must be force and violence or putting in fear, and this force and violence or putting in fear must be the means by which the larceny is effected, and must be prior to or simultaneous with it. If the larceny is effected first, and the fear or force is applied afterwards for the purpose of enabling the thief to retain possession of his booty, or for any other purpose, there is no robbery.³

While mere snatching from the hand or picking from the pocket of a person will be but larceny from the person,⁴ if, in addition to the force used in merely taking possession of the property, any force is used to overcome the resistance of the possessor, the crime is robbery.⁵ So it seems to be the law that, if the article be attached to the person, and the force be such as to break the attachment or to injure the person from whom the property is taken, as where a steel or silk chain attached to the stolen watch and around the neck was broken,⁶ or a lady's ear from which a ring was snatched was

¹ *C. v. Holland*, 1 Duv. (Ky.) 182; *C. v. Humphries*, 7 Mass. 242; *S. v. Gorham*, 55 N. H. 152.

² *Post*, § 270.

³ *Harman's Case*, 1 Hale P. C. 534; *Rex v. Francis*, 2 Str. 1015; *Rex v. Gnosil*, 1 C. & P. 304; *Thomas v. S.*, 91 Ala. 34, 9 So. 81; *Jackson v. S.*, 114 Ga. 826, 40 S. E. 1001.

⁴ *Post*, § 293; *Colby v. S.* (Fla.), 35 So. 189; *S. v. Doyle*, 77 Ga. 513; *Spencer v. S.*, 106 Ga. 692, 32 S. E. 849; *contra*, *Jones v. C.*, 23 Ky. L. R. 2081, 66 S. W. 633.

⁵ *Williams v. C.*, 20 Ky. L. R. 1850, 50 S. W. 240.

⁶ *Rex v. Mason*, R. & R. 419; *S. v. McCune*, 5 R. I. 60; *contra*, *Bowlin v. S.* (Ark.), 81 S. W. 838.

torn, the offence is robbery, and not merely larceny from the person.¹ So, if there is a struggle for the possession of the property between the thief and the owner.² So, also, if force be applied for the purpose of drawing off the attention of the person being robbed.³

The force must be used with the intent of accomplishing the larceny. Where a wound was unintentionally inflicted on the hand of the owner of a basket, the intent being simply to cut the basket from behind the owner's wagon, the crime is simple larceny, not robbery.⁴

§ 247. **Putting in Fear.**—Neither actual violence nor the fear of actual violence is necessary to constitute the offence. The putting in fear is using a certain kind of force, or constructive violence.⁵ Fear of personal injury is enough, as where there is a threat to shoot, or strike with a dangerous weapon, or in some other way inflict personal injury, even though it be in the future.⁶ Time, place, and circumstance, as by the gathering about of a crowd apparently sympathizing with the thief, and showing that resistance would be vain,⁷ are to be taken into account in determining whether this fear exists.⁸ But the fear induced by a threat to injure one's character, or to deprive him of a situation whereby he earns his living, is also enough.⁹ It is said, however, that the fear of injury to character, and consequent loss of means of livelihood, has never been held sufficient, except in cases where

¹ *Rex v. Lapier*, 2 East P. C. 557.

² *Davies's Case*, 1 Leach Cr. L. (4th ed.) 290, n.; *S. v. Broderick*, 59 Mo. 318. But see *S. v. John*, 5 Jones (N. C.), 163.

³ *Anon.*, 1 Lewin, 300; *Snyder v. C.*, 21 Ky. L. R. 1538, 55 S. W. 679; *Mahoney v. P.*, 5 T. & C. (N. Y.) 329; *C. v. Snelling*, 4 Binn. (Pa.) 379.

⁴ *Reg. v. Edwards*, 1 Cox C. C. 32.

⁵ *Donnally's Case*, 1 Leach Cr. L. (4th ed.) 193; *Long v. S.*, 12 Ga. 293.

⁶ *S. v. Howerton*, 58 Mo. 581.

⁷ *Hughes's Case*, 1 Lewin, 301; *Rex v. Taplin*, 2 East P. C. 712.

⁸ *Long v. S.*, *ante*.

⁹ *Rex v. Egerton*, R. & R. 375; *Rex v. Gardner*, 1 C. & P. 479; *P. v. McDaniels*, 1 Park. C. R. (N. Y.) 198.

the threat was to charge with the crime of sodomy,¹ and the cases cited in the last preceding footnote are of this character.² So, also, it has been said that fear, induced by the threatened destruction of a child, is sufficient.³ And there seems to be no doubt that fear induced by threats to destroy one's property, as by threats of a mob to pull down one's house, is sufficient,⁴ this act being of a kind to threaten one's bodily safety. So with the exception of the sodomy cases, which must be regarded as anomalous, it would seem that the fear inspired must be, directly or indirectly, of a bodily harm.⁵ The same distinction exists in the cases of false arrests. If A threatens to arrest B, and the latter, to buy him off, gives the pretended officer money, this has been held not to be robbery.⁶ But where the giving up of the property was because of fear of bodily harm induced by the defendant, the fact that he was at the time pretending to be an officer would render it none the less robbery.⁷

It is sometimes said that the element of fear must exist in every case in order to constitute the crime of robbery.⁸ But there may be cases where there seems to be no opportunity for the action of fear; as where one is, without warning, knocked senseless by a single blow,⁹ or is not aware of the purpose and has actually no fear, that being only a diversion of the force which is used,¹⁰ or is already, when assaulted, in such a

¹ *Rex v. Wood*, 2 East P. C. 732; *Long v. S.*, 12 Ga. 293; *Britt v. S.*, 7 Humph. (Tenn.) 45.

² Compare *Rex v. Edwards*, 5 C. & P. 518; *Thompson v. S.*, 61 Neb. 210, 85 N. W. 62.

³ *Ilatham, B.*, in *Donnelly's Case*, 1 Leach Cr. L. (4th ed.) 193; *Eyre, C. J.*, *Reane's Case*, 2 Leach Cr. L. (4th ed.) 616.

⁴ *Rex v. Astley*, 2 East P. C. 729; *Rex v. Winkworth*, 4 C. & P. 444.

⁵ See 2 Bish. New C. L., §§ 1171 et seq.

⁶ *Rex v. Knewland*, 2 Leach (3d ed.), 833; *Simmons v. S.*, 41 Fla. 316, 25 So. 881; *Perkins v. S.*, 65 Ind. 317.

⁷ *McCormick v. S.*, 26 Tex. App. 678, 9 S. W. 277; *Williams v. S.* (Tex.), 55 S. W. 500.

⁸ 1 Hawk. P. C. (8th ed.) 214.

⁹ *Foster C. L.* 128; *McDaniel v. S.*, 8 S. & M. (Miss.) 401.

¹⁰ *Mahoney v. P.*, 5 T. & C. (N. Y.) 329; *C. v. Snelling*, 4 Binn. (Pa.) 379.

state of insensibility as to be incapable of fear;¹ and the weight of authority, both ancient and modern, is that it need not be alleged in the indictment under the common law.² And those courts which hold that fear is necessary make the force which would ordinarily excite fear conclusive evidence of it.³

The cases just cited also show that "against the will" means without consent.⁴ Where three parties get up a pretended robbery for the sake of obtaining a reward, the taking is not against the will, or without consent.⁵ Nor is it where the property is parted with for the purpose of making a case for prosecution.⁶

§ 248. **The Taking** must be from the person, or from the personal presence. Thus, if a man assaults another, and, having put him in fear, drives away his cattle from the pasture⁷ in his presence, or picks up a purse from the ground, where it had fallen or been thrown into a bush during the scuffle, the taking is complete.⁸ The question is, whether the chattel at the time it was taken was under the protection of the person.⁹ But the possession of the robber, if complete, need be only momentary; and if it be immediately taken away from him, it is still robbery.¹⁰ Though the thief obtain possession by delivery from the owner, as where he points a pistol, and either directly demands money,¹¹ or demands

¹ *Bloomer v. P.*, 1 Abb. Ap. Dec. (N. Y.) 146.

² *Donnally's Case*, 1 Leach Cr. L. (4th ed.) 193; *Rex v. McDaniel*, Foster C. L. 121, K. 259; *C. v. Humphries*, 7 Mass. 242; *S. v. Broderick*, 59 Mo. 318; *S. v. Gorham*, 55 N. H. 152.

³ *Reane's Case*, 2 Leach Cr. L. (4th ed.) 616; *Long v. S.*, 12 Ga. 293.

⁴ See also *Larceny*, *post*, § 270.

⁵ *Rex v. McDaniel*, *ante*.

⁶ *Rex v. Fuller*, R. & R. 408.

⁷ 1 Hawk. P. C. (8th ed.) 214.

⁸ 2 East P. C. 707; 1 Hale P. C. 533; *Long v. S.*, *ante*; *Crews v. S.*, 3 Cold. (Tenn.) 350; *U. S. v. Jones*, 3 Wash. C. Ct. 209, Fed. Cas. No. 15,494.

⁹ *Reg. v. Selway*, 8 Cox C. C. 235; *S. v. Kennedy*, 154 Mo. 268, 55 S. W. 293.

¹⁰ *Peat's Case*, 1 Leach Cr. L. (4th ed.) 228.

¹¹ *Norden's Case*, Foster C. L. 129.

it under pretence of asking alms,¹ even after having ceased to resort to force,² — the delivery in each case being induced by fear, — it is a taking within the meaning of the law, and he is in each case guilty of robbery. And so may a forced sale be robbery, where the delivery is obtained by fear,³ if the full value be not given in return for the property taken.⁴ And where a man who is attempting rape, to whom the woman gives money to induce him to desist, continues his assault, he is guilty of robbery.⁵

¹ 1 Hale P. C. 533.

² Hawk. P. C. (8th ed.) 214, § 7.

³ *Rex v. Simons*, 2 East P. C. 712.

⁴ *Fisherman's Case*, 2 East P. C. 661, M. 807; 4 Bl. Com. 244.

⁵ *Rex v. Blackham*, 2 East P. C. 711.

CHAPTER VII.

OFFENCES AGAINST A DWELLING-HOUSE.

§ 250. Arson.

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§ 256. Burglary.

§ 249. **Protection of a Dwelling-house.** — The law gives a special protection to a dwelling-house, as a man's castle, within which it is for the public interest that he should be protected. We have already seen¹ that when attacked in his dwelling-house, a man may take life to keep out the intruders. In addition to this measure of protection, the common law punishes certain violations of the protection of a dwelling. Two important crimes are of this sort: arson and burglary.

ARSON.

§ 250. **Arson** is the malicious burning of another's dwelling-house.

It is an offence against the security afforded by a man's dwelling-house; and the law looks upon it in this light, rather than as an injury to his property. It regards the violation of the sanctity of one's abode as a much graver offence than the mere injury to his property, just as it regards the larceny of a watch from the person or from a building as a graver offence than the simple larceny of the watch without these attendant circumstances.² The property protected is the house, not its materials; it is not arson to pull down a house and then set fire to the pile of lumber.³

¹ *Ante*, § 67.

² *P. v. Gates*, 15 Wend. (N. Y.) 159.

³ *Mulligan v. S.*, 25 Tex. App. 199; *Landers v. S.*, 39 Tex. Cr. R. 671, 47 S. W. 1008.

§ 251. **What "Dwelling-house" Embraces.** — At common law the term "dwelling-house" embraced all outhouses within the same curtilage, and used as part and parcel of the residence, though not under the same roof.¹ Curtilage means an enclosure of a piece of land around a dwelling-house, usually including the buildings occupied in connection with the use of the dwelling-house, whether the enclosure be made by a fence or by the buildings themselves;² and a barn, the front of which forms part of the division fence, is within the curtilage.³

§ 252. **Dwelling-house. Ownership.** — Simply burning one's own house is not arson, nor any offence, at common law, unless it be accompanied by a design to injure.⁴ So where the property is burned by a third person at the request of the owner the crime is not committed.⁵ But by statute in some of the States the wilful and malicious burning of any building is made punishable; and in such case the owner may be guilty of the offence by burning his own barn.⁶ He may be said to own the house who has the right of present possession, as the lessee or mortgagor before foreclosure.⁷ A husband is not guilty of the crime who burns the house which he jointly occupies as tenant by the curtesy with his wife, who owns the fee; nor the wife who sets fire to her husband's house;⁸ though a widow whose dower has not been assigned, and who has no present right of possession, the house being occupied by a tenant, may be guilty of it. So of a reversioner, who burns the house before the tenant's right of occupation has expired.⁹

¹ 4 Bl. Com. 221.

² *C. v. Barney*, 10 Cush. (Mass.) 478; *P. v. Taylor*, 2 Mich. 250; *post*, Burglary; Bishop, Stat. Crimes, §§ 277 et seq.

³ *Washington v. S.*, 82 Ala. 31, 2 So. 356. Compare *Curkendall v. P.*, 36 Mich. 309.

⁴ *Bloss v. Tobey*, 2 Pick. (Mass.) 320.

⁵ *Heard v. S.*, 81 Ala. 55, 1 So. 640; *C. v. Makely*, 131 Mass. 421.

⁶ *S. v. Hurd*, 51 N. H. 176. See also *Shepherd v. P.*, 19 N. Y. 537.

⁷ *Rex v. Pedley*, 1 Leach Cr. L. (4th ed.) 242; *Rex v. Spalding*, 1 Leach Cr. L. (4th ed.) 218; *P. v. Van Blareum*, 2 Johns. (N. Y.) 105.

⁸ *Rex v. March*, 1 Moo. 182, C. 484; *Snyder v. P.*, 26 Mich. 106. But in Indiana it is held that under the statute the wife is guilty of arson who burns her husband's house. *Emig v. Daum*, 1 Ind. App. 146, 27 N. E. 322.

⁹ *Reg. v. Harris*, Fost. Cr. Law, 113, M. 928.

A servant, though living in the house, yet having no right of possession, may commit the crime;¹ but a tenancy for a year, or any special ownership which carries with it the right of possession at the time of the burning, is sufficient to exempt from guilt.²

§ 253. **Dwelling-house. Occupation.** — The building will be considered a dwelling-house within the meaning of the law, if actually occupied as such, though it may not have been erected for that purpose, and may also be occupied for other purposes, as for a jail, or a building occupied in part as a lodging-house.³ So where part of the building is used as a store, if the rest is used as a dwelling-house, it may be the subject of arson.⁴ It must be in some substantial sense an occupied house, and that, by the person alleged to be the owner. It is not necessary that he should be actually present in the house at the time of the burning. If the house contain the occupant's effects, and he has the design to return, after a temporary absence, this is a sufficient occupation to constitute it a dwelling-house.⁵ Mere ownership, without occupancy by the owner, is not sufficient.⁶ Nor is the fact that it is habitable, and intended for occupancy, unless it is also in some sense used as a place of residence.⁷ It must be a completed house, ready for occupancy, and not an abandoned one, unfit for habitation.⁸

¹ *Rex v. Gowen*, 2 East P. C. 1027, M. 930.

² *Holme's Case*, Croke Car. 376; *S. v. Young*, 139 Ala. 136, 36 So. 19; *S. v. Lyon*, 12 Conn. 487; *McNeal v. Woods*, 3 Blackf. (Ind.) 485; *P. v. Gates*, 15 Wend. (N. Y.) 159; 2 East P. C. 1022; *contra*: *Kelley v. S.*, 44 Tex. Cr. R. 187, 70 S. W. 20 (statutory). See also *post*, Burglary.

³ *P. v. Orcutt*, 1 Park. (N. Y.) C. R. 252; *P. v. Cotteral*, 18 Johns. (N. Y.) 115; *Smith v. S.*, 23 Tex. App. 357. See however, *contra*, *Jenkins v. S.*, 53 Ga. 33.

⁴ *S. v. Jones*, 171 Mo. 401, 71 S. W. 680.

⁵ *S. v. Toole*, 29 Conn. 342; *Johnson v. S.*, 48 Ga. 116.

⁶ *Hicks v. S.*, 43 Fla. 171, 29 So. 631; *C. v. Barney*, 10 Cush. (Mass.) 478.

⁷ *S. v. Warren*, 33 Me. 30; *Hooker v. C.*, 13 Grat. (Va.) 763.

⁸ *Elsmore v. St. Briavels*, 8 B. & C. 461; *S. v. McGowen*, 20 Conn. 245; *P. v. Handley*, 93 Mich. 46, 52 N. W. 1032. See also *McGary v. P.*, 45 N. Y. 153.

§ 254. **Malice.** — The malice requisite to constitute the crime is that general malice which accompanies a criminal purpose. Carelessness or negligence, without a specific intent unlawfully to burn or to do some other wrong, does not constitute the malice which is an essential ingredient in the crime of arson.¹ But when, intending to burn the house of one, the accused burns the house of another, the crime is committed. Arson being intended and committed, it is not permissible that the guilty party should escape the consequences by alleging his mistake as to one of the varying incidents of the crime. So far as the public offence is concerned, it is immaterial whether the house burned be that of one person or another.² And one may be guilty of arson by setting fire to his own house, whereby the house of another is burned, if the proximity was such that the burning of the latter was the natural and probable consequence of burning the former.³ If the burning accomplished was not with a felonious intent, but for a purpose which if accomplished would constitute a crime of a grade below a felony, — as where a prisoner sets fire to the jail in which he is confined with the purpose of thereby effecting his escape, — this, it has been held is not arson, if the attempt to escape is only a misdemeanor.⁴ But the contrary has been held in Alabama ;⁵ and in England a person who set the fire for the purpose of getting the reward offered for the earliest information of it was held guilty of arson.⁶

The cases upon this point, however, seem to be wholly irreconcilable. Where there is the intent to burn coincident with the act of burning, the crime seems to be complete, upon general and well-settled principles and according to every definition ; and the fact that the burning was the secondary rather than the primary purpose, — a felonious means to an unlawful

¹ 4 Bl. Com. 222.

² 1 Hale P. C. 569 ; 1 Hawk. P. C. (8th ed.) 139, § 15.

³ *Rex v. Isaac*, 2 East P. C. 1031.

⁴ *P. v. Cotteral*, 18 Johns. (N. Y.) 115 ; *S. v. Mitchell*, 5 Ired. (N. C.) 350 ; *Delany v. S.*, 41 Tex. 601.

⁵ *Luke v. S.*, 49 Ala. 30.

⁶ *Reg. v. Regan*, 4 Cox C. C. 335, M. 141.

but not felonious end, — does not seem to relieve it in any respect or degree of its criminality. It sounds strangely, and seems not in accordance with sound reason or public policy that one who intentionally commits a felony and a misdemeanor, the former as a step toward the latter, shall be deemed less guilty than he would have been if the commission of the felony had been his sole purpose, and he had committed no misdemeanor.¹ The failure to observe the distinction between intent and motive, the former of which qualifies the act, while the latter moves to it,² has doubtless led to the confusion. The man who deliberately sets fire to and burns a jail intends to burn it, whether his motive be self-sacrifice, revenge, escape, or reward.³ The case might be different if, while a party is stealing in a building, he accidentally, by dropping a match, sets fire to the building. It has been recently held in Ireland that this, if done on board a vessel, would not come within a statute punishing the *malicious* burning of a vessel.⁴ But it might be doubtful, in case of arson, if there is any malice or evil intent in the crime intended, — if it be not a mere *malum prohibitum*.⁵

§ 255. **Burning** means an actual combustion of some portion of the house, so that the wood is actually on fire. It is sufficient if it is charred. It is not necessary that it be consumed or destroyed;⁶ but mere scorching is not enough.⁷

¹ See 1 Bish. New Cr. Law, §§ 323-345; 2 *ibid.*, §§ 14, 15.

² *Ante*, §§ 26, 32.

³ *Reg. v. Regan*, 4 Cox C. C. 335, M. 141.

⁴ *Reg. v. Faulkner*, 13 Cox C. C. 550, C. 106, K. 152.

⁵ 2 Russ on Crimes (5th ed.), 906.

⁶ *Reg. v. Parker*, 9 C. & P. 45; *Mary v. S.*, 24 Ark. 44; *P. v. Haggerty*, 46 Cal. 354; *S. v. Spiegel*, 111 Ia. 701, 83 N. W. 722; *C. v. Tucker*, 110 Mass. 403; *P. v. Butler*, 16 Johns. (N. Y.) 203; *S. v. Sandy*, 3 Ired. (N. C.) 570. The statutes of most if not all of the States have modified the common law of arson to a greater or less extent; and while decisions will be found apparently inconsistent with the principles stated in the text, it will doubtless be found that such decisions depend upon the peculiarities of the respective statutes.

⁷ *Reg. v. Russell*, C. & M. 541, M. 931; *Woolsey v. S.*, 30 Tex. App. 346, 17 S. W. 546.

BURGLARY.

§ 256. **Burglary** is the breaking and entering of another's dwelling-house in the night-time, with intent to commit a felony therein.¹ The breaking may be actual or constructive. If there is neither force nor fraud there is no burglary.²

§ 257. **Actual Breaking** takes place when any apartment of the house is broken into by force; as by lifting a latch, or sliding a bolt,³ or turning a lock or a button,⁴ or the fastening of a window, or breaking or removing a pane of glass, or lifting up or pulling down an unfastened window-sash⁵ or trap-door, or pulling open a sash which swings on hinges, or opening a door whether held in place by friction⁶ or by a spring,⁷ or removing a piece of wood which keeps the door in place⁸ or cutting out a netting of twine which is fastened over an open window, or removing a screen,⁹ or opening the outside shutters. The offence consists in violating the common security of the dwelling-house. It is immaterial whether the doors and windows are fastened or unfastened, provided the house is secured in the ordinary way, and is not left so carelessly open as to invite an entry.¹⁰ But leaving the door or window ajar, or unclosed even to a slight degree, and not so far as to admit the body, would constitute such an invitation, so that opening them further would not amount to a burglarious breaking;¹¹ and entry through an open transom is not a

¹ 1 Hawk. P. C. (8th ed.) 129.

² *St. Louis v. S.* (Tex.), 59 S. W. 889.

³ *S. v. O'Brien*, 81 Ia. 93, 46 N. W. 861.

⁴ *S. v. Helms*, 179 Mo. 280, 78 S. W. 592.

⁵ *Rex v. Hyams*, 7 C. & P. 441, M. 909; *S. v. Boon*, 13 Ired. (N. C.) 244.

⁶ *S. v. Reid*, 20 Ia. 413; *Finch v. C.*, 14 Grat. (Va.) 643.

⁷ *S. v. Connors*, 95 Ia. 485, 64 N. W. 295.

⁸ *S. v. Powell*, 61 Kan. 81, 58 P. 968.

⁹ *S. v. Herbert*, 63 Kan. 516, 66 P. 235.

¹⁰ *Rex v. Haines*, R. & R. C. C. 451; *Rex v. Russell*, 1 Moo. C. C. 377, 2 Lead. Cr. Cas. 48, and note; *Pressley v. S.*, 111 Ala. 34, 20 So. 647; *C. v. Stephenson*, 8 Pick. (Mass.) 354. Compare *Minter v. S.*, 71 Ark. 178, 71 S. W. 944.

¹¹ *Rex v. Smith*, 1 Moo. C. C. 178; *Green v. S.*, 68 Ala. 539; *C. v.*

breaking¹ though lifting an unfastened transom which swings upward is a breaking.² It is also held that entering a house by way of the chimney, or even getting into the chimney, is a breaking, though no actual force is used, since it is not usual to secure such an opening, and the house is as much closed as is reasonable or requisite.³

§ 258. **Constructive Breaking.**—A constructive breaking is where fraud or threats are substituted for force, whereby an entry is effected; as where entrance is procured by conspiring with persons within the house;⁴ or by pretence of hiring lodgings, obtaining refreshment, or other business;⁵ or under color of legal process fraudulently obtained;⁶ or by enticing the owner out of his house, if the entry be made immediately, and before the owner's family have time to shut the door.⁷ So where defendant secreted himself in a box, which he procured to be put in an express car by the agent of the express company this was held a breaking of the car.⁸

§ 259. **Breaking. Connivance or Consent.**—But if the owner, being apprised by his servant of a plan to rob the house, gives his servant the keys, with instructions to carry out the plan, and the servant and the prisoner go together into the house, the servant unlocking the door, this is said to be no burglary, as the act is by the owner's consent;⁹ though if the owner,

Strupney, 105 Mass. 588. Compare *P. v. Dupre*, 98 Mich. 26, 56 N. W. 1046, M. 909.

¹ *McGrath v. S.*, 25 Neb. 780, 41 N. W. 780.

² *Timmons v. S.*, 34 O. St. 426.

³ *Rex v. Brice*, R. & R. C. C. 450, M. 911; *Walker v. S.*, 52 Ala. 376; *S. v. Willis*, 7 Jones (N. C.), 190.

⁴ 2 East P. C. 486; *S. v. Rowe*, 98 N. C. 629, 4 S. E. 506.

⁵ 2 East P. C. 486; *Le Mott's Case*, Kel. 42, M. 913; *S. v. Mordecai*, 68 N. C. 207; *S. v. Foster*, 129 N. C. 704, 40 S. E. 209; *Johnston v. C.*, 85 Pa. 54.

⁶ *Rex v. Farre*, Kel. 43; *S. v. Johnson*, Ph. (N. C.) 186.

⁷ *S. v. Henry*, 9 Ired. (N. C.) 463. But see opinion of Ruffin, C. J., who dissented upon the point as to the necessity of immediate entry. See also *Breese v. S.*, 12 O. St. 146.

⁸ *Nicholls v. S.*, 68 Wis. 416, 32 N. W. 543.

⁹ *Allen v. S.*, 40 Ala. 334. See also *Reg. v. Hancock*, C. C. R., 6 Repr. 351.

being so apprised, merely lies in wait for the purpose of detecting the perpetrators, this is no consent, and they will be guilty of the offence.¹

§ 260. **Dwelling-House.**—The breaking must be of some part of that actual enclosure which constitutes the dwelling-house. The mere passage across that imaginary line with which the law surrounds every man's realty, and which constitutes a sufficient breaking upon which to found the action of trespass *quare clausum fregit*, is not sufficient. But where part of a structure is occupied as a dwelling, it is burglary to break into another part within the same walls and under the same roof, as, for instance, a lower floor occupied by the same person as a shop, though there is no internal connection between the two parts.²

§ 261. **Breaking within the House.**—The breaking of the outer enclosure is not essential, if, after the entry through this, the house or some parts of it be broken. Thus, the forcing of the fastened outer shutters of a window would be a breaking; if these happened to be open, then the forcing of the window would be a breaking; and if both were open, and an entry be effected through them, then a breaking open of an inner door, a part of the house, would constitute the offence;³ though not the breaking open a chest, cupboard, clothes-press, or other movable, not part of the house.⁴ So if one guest at an inn break and enter the room of another guest, it is burglary;⁵ and so if done by a third person, and this whether the occupant is a permanent dweller at the hotel or a transient.⁶ It was formerly doubted whether an inn-keeper would be guilty

¹ *Rex v. Bigley*, 1 C. & D. (Irish) C. C. 202; *Thompson v. S.*, 18 Ind. 386. Compare also *Alexander v. S.*, 12 Tex. 540, with *Reg. v. Hancock*, ante. See ante, §§ 21, 22.

² *P. v. Griffin*, 77 Mich. 585, 43 N. W. 1061; *Hahn v. P.*, 60 Neb. 487, 83 N. W. 674; *Quinn v. P.*, 71 N. Y. 561, M. 922. See post, § 264.

³ *S. v. Scripture*, 42 N. H. 485; *S. v. Wilson, Coxe* (N. J.), 439; *Rolland v. C.*, 85 Pa. 66.

⁴ *Ibid.*

⁵ *S. v. Clark*, 42 Vt. 629.

⁶ *Holland v. S.* (Tex.), 74 S. W. 763; *S. v. Burton*, 27 Wash. 528, 67 P. 1097.

of burglary by breaking and entering the room of his guest, the doubt resting upon the question whether the room was the guest's for the time being.¹ Under statutes making a special or constructive ownership sufficient, the doubt can hardly exist.²

§ 262. **Breaking out.**—It was early enacted,³ to solve the doubts which had theretofore prevailed, that the entry by day or by night into a dwelling-house without breaking, with intent to commit a felony, and the breaking out of the house, should constitute the crime of burglary. And such, we believe, is the law in England to the present day.⁴ The indictment should charge the breaking out; and if so charged, it seems that in this country the prisoner may be convicted, where the statute of Anne has been adopted as part of the common law, or has been substantially followed by the statute of the State,⁵ but not otherwise.⁶ No case has been found of a conviction under such an indictment; and it is at least doubtful if it would now anywhere be held, unless under the clearest evidence, that the statute of Anne is obligatory, that a breaking out to escape is a sufficient breaking to constitute burglary.⁷

§ 263. **Entry.**—In order to constitute an entry, it is not necessary that the whole person should be within the house. Thrusting in the hand or a stick, for the purpose of getting possession of goods within, through an aperture broken for the purpose, is an entry.⁸ But the mere passage of the instrument through in breaking, as an auger by which the break is effected, or a bar by which the window is to be pried open,

¹ 2 Bish. New Cr. Law, § 106. Compare *S. v. Moore*, 12 N. H. 42, M. 918.

² *Post*, § 265.

³ 12 Anne, c. 1, § 7.

⁴ Steph. Dig. Cr. Law, art. 319; *Rex v. McKearney*, Jebb C. C. 99, 2 Lead. Cr. Cas. 62 and note.

⁵ *S. v. McPherson*, 70 N. C. 239.

⁶ *White v. S.*, 51 Ga. 285.

⁷ *Rolland v. C.*, 85 Pa. 66.

⁸ *Rex v. Bailey*, R. & R. 341; *S. v. Boysen*, 30 Wash. 338, 70 P. 740.

has been held not to be an entry; ¹ yet where the auger also effects the entry, as where one bores through the floor of a corn-crib and the corn runs down through the hole, that is a sufficient entry.² And the thrusting of the hand underneath the window, to lift it, so that the fingers extend to the inside of the window, has been held to be a sufficient entry.³ So the sending in of a boy after breaking, the boy being an innocent agent, to bring out the goods, is an entry by the burglar, who all the while remains outside.⁴ The cases, in other words, seem to establish this distinction; where the implement held in the hands passes within the enclosure for the purpose of breaking only, there is no entry; but if the breaking is done by the hand and that passes within the enclosure, even though only as a part of the act of breaking, or if the implement passes in for the purpose of committing the intended felony, there is an entry.⁵ And, upon principle, there seems to be no doubt that one who shoots a ball or thrusts a sword through a window with intent to kill, though he fail of his purpose to kill, is nevertheless guilty of breaking and entering.⁶ Similarly, it is of course immaterial that the defendant found nothing to steal, or was frightened away before he in fact committed the intended substantive crime.⁷

§ 264. **Dwelling-house. Occupancy.** — As in arson, the dwelling-house comprehends all the buildings within the same curtilage or common fence, and used by the owner as part and parcel thereof, though not contiguous; ⁸ as, for instance, a

¹ 4 Bl. Com. 227; *Rex v. Hughes*, 1 Leach Cr. L. (4th ed.) 406; *Rex v. Rust*, 1 Moo. C. C. 183.

² *Walker v. S.*, 63 Ala. 49; *S. v. Crawford*, 8 N. D. 539, 80 N. W. 193, M. 916.

³ *Rex v. Davis*, R. & R. C. C. 499, M. 914; *Franco v. S.*, 42 Tex. 276; *Nash v. S.*, 20 Tex. App. 384.

⁴ 1 Hale P. C. 555.

⁵ See in addition to the cases cited above *Reg. v. O'Brien*, 4 Cox C. C. 400, M. 915; compare *S. v. McCall*, 4 Ala. 643.

⁶ *Ante*, §§ 183, 184a.

⁷ *Ragland v. S.*, 71 Ark. 65, 70 S. W. 1039; *Lanier v. S.*, 76 Ga. 304; *S. v. McDaniel*, 60 N. C. 245; *S. v. Beal*, 37 O. St. 108.

⁸ *Ante*, § 251.

smokehouse, the front part and doors of which were in the yard of the dwelling-house, though the rear, into which the break and entry were made, was not.¹ And it has been held in this country that it is sufficient if the building entered be situated in proximity to the dwelling and in fact used in connection therewith for domestic purposes.² It must be a place of actual residence or habitation, though it is not essential that any one should be within at the very time of the offence. If the occupants are away temporarily, but with the design of returning, and it is the house where they may be said to live, — their actual residence, — this constitutes it their dwelling-house.³ But if the occupation is otherwise than as a place of residence, as for storage, or even casually for lodgings, or if persons not of the family nor in the general service of the owner sleep, but do not otherwise live there, and for the purpose of protection only, it is not a dwelling-house in the sense of the law. Nor is a temporary booth or tent erected at a fair or market such a dwelling-house.⁴ If, however, the house be habitually occupied in part as a storehouse and in part as the lodging place of the servants and clerks of the owner, it is his dwelling-house.⁵ And if it be habitually slept in by one of the family, or one in the service of the owner, even if slept in for the purpose of protection, it has been held to be a dwelling-house within the sense of the law;⁶ and by the same court, that if the person so sleeping in the store for its protection be not a member of the family, or in the service of the same, he is but a watchman, and the store cannot be said to be the dwelling-house of the owner.⁷

¹ *Fisher v. S.*, 43 Ala. 17; *P. v. Griffith*, 133 Mich. 607, 95 N. W. 719.

² *S. v. Bugg*, 66 Kan. 668, 72 P. 236; *contra*: *Rex v. Garland*, 1 Leach (4th ed.), 144, M. 920.

³ *S. v. Weber*, 156 Mo. 257, 56 S. W. 893; *Alvia v. S.*, 42 Tex. Cr. R. 424, 60 S. W. 551.

⁴ *S. v. Jenkins*, 5 Jones (N. C.), 430; *C. v. Brown*, 3 Rawle (Pa.), 207; *Armour v. S.*, 3 Humph. (Tenn.) 379; 3 Greenl. Ev., §§ 79, 80.

⁵ *Ex parte Vincent*, 26 Ala. 145.

⁶ *S. v. Outlaw*, 72 N. C. 598; *S. v. Williams*, 90 N. C. 724.

⁷ *S. v. Potts*, 75 N. C. 129; so *Rex v. Harris*, 2 Leach (4th ed.), 701, M. 921.

§ 265. **Dwelling-house. Ownership.** — There may be many dwelling-houses under the same roof; as where separate apartments are rented to divers occupants, who have exclusive control of their several apartments.¹ If, however, the general owner also occupies, by himself or his servant, the building in part, exercising a supervision over it, and letting it to lodgers or to guests, the house must be treated as his, unless, as in some States is the case, a special or constructive ownership is made by statute sufficient evidence of ownership.² But this is rather a question of procedure, not pertaining to the definition of the crime.³

A church being, as Coke says, the mansion-house of the Almighty, is by the common law a dwelling-house, within the meaning of the definition of burglary.⁴ So also, under the old law, was a walled town.⁵

§ 266. **Time.** — The time of both breaking and entering must be in the night, and this, at common law, was usually held to be the period during which the face of a person cannot be discerned by the light of the sun; though some authorities fixed the limits more exactly as the period between sunset and sunrise.⁶ Now, by statute,⁷ in England, night begins at nine and ends at six. In Massachusetts, the meaning of "night-time" in criminal prosecutions is defined to be from one hour after sunset to one hour before sunrise;⁸ and doubtless other States have fixed the limit by statute. It may happen that the acts culminating in the commission of the intended felony extend through several days and nights, as where one is engaged day and night in working his way through a substantial partition wall. If the actual perforation be made during one night, and the entry on the same or a subsequent night, the offence is

¹ *Mason v. P.*, 26 N. Y. 200.

² 3 Greenl. Ev., §§ 57, 81; *S. v. Outlaw*, *ante*.

³ See also *Arson*, *ante*, § 253.

⁴ 3d Inst. 64; *Reg. v. Baker*, 3 Cox C. C. 581.

⁵ 4 Bl. Com. 224.

⁶ 1 Hawk. P. C. (8th ed.) 130, § 2; *S. v. Bancroft*, 10 N. H. 105.

⁷ 7 Wm. IV, & 1 Vict. c. 86, § 4.

⁸ *C. v. Williams*, 2 Cush. (Mass.) 582.

complete, both being in pursuance of the same design.¹ In some States, by statute, the question of time becomes immaterial.

§ 267. **Intent.**—As the breaking and entry must be with intent to commit a felony, the intent to commit a misdemeanor only would not be sufficient to constitute the crime. Thus, a breaking and entry with intent to commit adultery would or would not constitute the offence, according as adultery might be a felony, misdemeanor, or, as in some States it is, no crime at all;² and if the intent be to cut off the owner's ears, this is not a burglary, since the cutting off an ear does not amount to felony, — mayhem, — at common law.³ So if the person who breaks is so intoxicated as to be incapable of entertaining any intent.⁴

§ 268. **Statutory Breakings.**—The crime of burglary has been much extended by statute. Thus breaking and entering in the day-time has been made criminal; and so has larceny from a dwelling-house, though there has been no breaking. Other buildings have been given protection, and in most jurisdictions it is made a crime to break and enter any building for the purpose of committing felony therein.⁵ An unfinished building, which is, however, used for storing tools, is a building within such a statute,⁶ and it is a sufficient breaking to cut through canvas screens placed in the windows.⁷ But a tomb is not a building within the meaning of such a statute.⁸ A building may be within the statutory definition, though of a sort unknown when the statute was passed. Thus a railroad station is a warehouse, within the meaning of a statute passed before the time of railroads.⁹

¹ *Rex v. Smith*, R. & R. 417; *C. v. Glover*, 111 Mass. 395.

² *S. v. Cooper*, 16 Vt. 551.

³ *C. v. Newell*, 7 Mass. 245, C. 482.

⁴ *S. v. Bell*, 29 Ia. 316.

⁵ Compare *P. v. Richards*, 108 N. Y. 137, 15 N. E. 371, C. 474.

⁶ *Clark v. S.*, 69 Wis. 203, 33 N. W. 436.

⁷ *Grimes v. S.*, 77 Ga. 762; compare *S. v. Petit*, 32 Wash. 129, 72 P. 1021.

⁸ *P. v. Richards*, *ante*.

⁹ *S. v. Bishop*, 51 Vt. 287.

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CHAPTER VIII.

OFFENCES AGAINST PROPERTY.

§ 270. Larceny.	§ 321. Malicious Mischief.
293. Embezzlement.	324. Receiving Stolen Goods.
305. False Pretences.	329. Forgery.
318. Cheating.	336. Counterfeiting.

§ 269. The common law, as has been seen,¹ did not regard every interference with the property of another as criminal. In business transactions each person was left to protect himself. It was, to be sure, a crime to *cheat* by the use of false tokens, such as would deceive the most careful; but ordinary cheating by lies was not criminal. The only crime against property of any importance was larceny; and this concerned not the title, but the possession, of personal property.

In the progress of society and trade other similar offences became of public concern; and statutes were accordingly passed extending the crime of larceny in all directions.

Thus it was made criminal to obtain the *title* of property by false pretences; or to embezzle property already in the offender's possession. Malicious injury to property, without disturbing the possession, was made punishable; and, finally, certain injuries to real property were punished as similar injuries to personal property had been. Further, protection was afforded by punishing one who received stolen goods knowingly.

Besides larceny, there was an important common law crime which affected property. This was forgery, which, together with its special form of counterfeiting, was a common and important crime in the Middle Ages.

¹ *Ante*, § 17.

LARCENY.

§ 270. **Larceny** is commonly defined to be the felonious taking and carrying away of the personal goods of another.¹ Notwithstanding the frequency of the offence, neither law writers nor judges are entirely agreed on its exact definition, and, as in case of "assault," it is still a matter of debate.² It seems to be agreed, however, that the definition given above is accurate, so far as it goes.

Formerly, larceny was either *petit*, that is, larceny of property the value of which did not exceed the sum of *twelve pence*; or *grand*, that is, larceny of property the value of which exceeded that sum; a distinction which was of consequence only as determining the degree of punishment, grand larceny being punishable with death, while petit larceny was only punishable by fine and imprisonment. Now, however, as no larceny is punishable with death, the distinction is practically done away with. Still, the value of the property at the present day determines, to some extent, the degree of punishment to be inflicted for the commission of the offence, and also the jurisdiction of the tribunal which is to take cognizance, and hence continues to be a matter material to be stated in the indictment.

Larceny is also *simple*, or plain theft, without any circumstances of aggravation; or *compound*, usually termed aggravated larceny, or larceny accompanied by circumstances which tend to increase the heinousness of the offence, as larceny from the person or larceny from the house, taking property from under the protection of the person or house being justly considered as indicating a greater degree of depravity in the thief than the taking of the same articles when not under such protection.

§ 271. **Personal Goods.** — Such property only is the subject of larceny at common law as is properly described as "goods and chattels." As soon as property is reduced into the form of a chattel, and so long as it retains that form, it may be

¹ 4 Bl. Com. 229.

² 2 Bish. New Cr. Law, § 758, and note.

stolen. Thus the milking a cow and the plucking of wool from a sheep are larcenies of the milk and wool.¹ So turpentine which has been collected from a tree,² illuminating gas drawn from a pipe through which it is transmitted,³ or water in the same condition,⁴ ice collected in an ice-house,⁵ a key in the lock of a door,⁶ a coffin,⁷ and the grave-clothes in which a person is buried,⁸ are all subjects of larceny; but not a dead body,⁹ for it is not property. The dead body of a domestic animal may, however, be stolen.¹⁰ In short, all goods and chattels reduced to possession and not abandoned,—such as can be said to be the present property of some owner at the time of the taking,—may be subject matters of larceny. There can be no larceny of abandoned property.¹¹ Property is abandoned, however, only if there is an intent so to do on the part of the owner.¹² A mere determination that no use shall be made of the property is not an abandonment of it.¹³ And the mere fact that property has been left untouched by the owner for many years does not, in itself, constitute an abandonment thereof.¹⁴

Upon the ground of non-reduction to possession, sea-weed found floating on the shore between high and low water mark

¹ *Rex v. Pitman*, 2 C. & P. 423.

² *S. v. Moore*, 11 Ired. (N. C.) 70.

³ *Reg. v. White*, 6 Cox C. C. 213; *C. v. Shaw*, 4 All. (Mass.) 308; *S. v. Wellman*, 34 Minn. 221, 25 N. W. 395; *Hutchison v. C.*, 82 Pa. 472.

⁴ *Ferens v. O'Brien*, 11 Q. B. D. 21, C. 238.

⁵ *Ward v. P.*, 3 Hill (N. Y.), 395.

⁶ *Hoskins v. Tarrence*, 5 Blackf. (Ind.) 417, C. 240, K. 239, M. 642.

⁷ *S. v. Doecke*, 68 Mo. 208.

⁸ *Hayne's Case*, 12 Coke 113, M. 662; *Wonson v. Sayward*, 13 Pick. (Mass.) 402.

⁹ 2 East P. C. 652.

¹⁰ *Reg. v. Edwards*, 13 Cox C. C. 384, C. 239, K. 247, M. 652.

¹¹ *Ibid.*; *McGoon v. Aukey*, 11 Ill. 558; *U. S. v. Smiley*, 6 Sawy. 640, Fed. Cas. No. 16,317.

¹² *Hayne's Case*, *ante*; *P. v. Campbell*, Add. (Pa.) 232, M. 685.

¹³ *Reg. v. Edwards*, *ante*.

¹⁴ *Livermore v. White*, 74 Me. 452 (forty-three years); *Sikes v. S.* (Tex.), 28 S. W. 688 (nine years).

cannot be claimed as belonging to the owner of the fee between high and low water mark, and it is no larceny to take it.¹

§ 272. **Instruments in Writing.**—When a paper contains writing which is of itself valuable, as, for instance, a promissory note, bond, mortgage, policy of insurance, or other chose in action or muniment of title, the character of chattel which the paper formerly had is merged in its far more important character of written obligation, and it is held to be no longer a chattel. Written obligations are therefore not subjects of larceny at the common law.²

A written instrument which does not contain an operative obligation still remains mere written paper, and is therefore a chattel and the subject of larceny.³ Such is a written obligation which has been performed, like a cancelled check,⁴ or a deed not yet delivered.⁵ But a written contract, although not stamped as required by statute, is not larcenable.⁶

In the absence of statutes, the courts of this country have been inclined to follow the common law. But statutes here, as also indeed in England, have generally interposed, and made not only goods and chattels, as by the common law, but also choses in action and muniments of title, whether they savored of realty or not, and in fact almost everything which constitutes personalty in contradistinction to the realty, subject matters of larceny.⁷ Indeed, in many if not most of the

¹ *Reg. v. Clinton*, Ir. Rep. 4 C. L. 6. See also *C. v. Sampson*, 97 Mass. 407.

² *Calye's Case*, 8 Co. 33 a; *Reg. v. Powell*, 5 Cox C. C. 396, C. 244; *Reg. v. Green*, 6 Cox C. C. 296; *Payne v. P.*, 6 Johns. (N. Y.) 103; *S. v. Wilson*, 3 Brev. (S. C.) 196; *U. S. v. Davis*, 5 Mason (C. Ct.), 356, Fed. Cas. No. 14,930.

³ *Rex v. Walker*, 1 Moo. C. C. 155, C. 246; *Reg. v. Perry*, 1 C. & K. 725, K. 245.

⁴ *Reg. v. Watts*, 4 Cox C. C. 336.

⁵ *P. v. Stevens*, 38 Hun (N. Y.), 62.

⁶ *Reg. v. Watts*, 6 Cox C. C. 304, M. 647.

⁷ *S. v. Stewart*, 1 Marv. (Del.) 542, 41 Atl. 188 (trading order); *C. v. Lawless*, 103 Mass. 425 (certificate of discharge); *S. v. Scanlan*, 89 Minn. 244, 94 N. W. 686 (voucher); *S. v. Morgan*, 109 Tenn. 157, 69 S. W.

States the felonious taking of parts of the realty may be indicted as larceny.

The fact that the property is illegally held or can be used only illegally does not make it any the less a subject of larceny.¹

§ 273. **No Larceny of Real Estate.** — At common law there could be no larceny of the realty, or any part of it not detached. Only chattels could be the subject of larceny, and these, with few limitations, might be. Deeds of real estate were regarded as so “savoring of the realty” as not to be subjects of larceny.²

Manure was not larcenable if spread on the earth as fertilizer; if not thus incorporated with the realty it could be stolen.³

§ 274. **Wild Animals**, in a state of nature, are not subjects of larceny; but when such of them as are fit for food, or for producing property, have been reclaimed, or brought into control and custody, so that they can fairly be said to be in possession, they then become property, and may be stolen. Bees,⁴ pea-fowl,⁵ doves,⁶ oysters,⁷ when reduced to possession, belong to this category. And so, doubtless, would fish be, if caught and kept in an artificial pond,⁸ as they certainly are if captured for food or for oil.⁹ But they must be actually reduced to possession. If they are only partially enclosed so that they can still escape, even though escape is unlikely, they

970 (county warrant); *Jolly v. U. S.*, 170 U. S. 402, 18 S. C. R. 624 (postage stamps); *Bishop Stat. Crim.*, 4th ed., §§ 325, and following.

¹ *Ante*, § 25.

² 1 Hawk. P. C. 142; *Rex v. Wody*, Y. B. 10 Ed. IV, 14 pl. 9, 10; *Rex v. Westbeer*, 1 Leach C. C. (3d ed.) 14, C. 242, M. 640.

³ *Carver v. Pierce*, Style 66, K. 238, M. 639. See *Ball v. White*, 39 O. St. 650.

⁴ *S. v. Murphy*, 8 Blackf. (Ind.) 498.

⁵ Anon., Y. B. 19 H. VIII, 2, pl. 11, K. 250; *C. v. Beaman*, 8 Gray (Mass.), 497.

⁶ *Rex v. Brooks*, 4 C. & P. 131; *C. v. Chace*, 9 Pick. (Mass.) 15.

⁷ *S. v. Taylor*, 3 Dutch. (N. J.) 117.

⁸ *Rex v. Hundson*, 2 East P. C. 611.

⁹ *Taber v. Jenny*, 1 Sprague (C. Ct.), 315, Fed. Cas. No. 13,720.

are not subjects of larceny.¹ So if wild animals fit for food are shot, and thus reduced to possession, they become subjects of larceny;² but chasing, without capture, gives no right of property.³ And where young partridges are reared from eggs under a hen, they are subjects of larceny so long as they continue reclaimed.⁴

But dogs, cats, foxes, bears, and the like, *feræ naturæ*, were not by the common law, and are not in this country, subjects of larceny, unless by some statute they are made so,⁵ or unless by the bestowal of care, labor, and expense upon them, or some part of them, they have by that treatment acquired value as property, as by being stuffed or skinned.⁶ And it has been generally held that, though they may by statute become property and subjects of a civil action, and liable to taxation, they are not subjects of larceny.⁷ Otherwise in New York,⁸ where it is held that, under a statute punishing the stealing of the "personal property" of another, the larceny of a dog is punishable.

§ 275. **Conversion into Chattels by Severance from Realty or by Killing.**—If portions of the realty become detached, not by natural causes, as blinds from a house,⁹ or a nugget of gold

¹ *Young v. Hitchins*, 6 Q. B. 606; *Sollers v. Sollers*, 77 Md. 148, 26 Atl. 188. Compare *S. v. Shaw*, 67 O. St. 157, 65 N. E. 875.

² *Reg. v. Townley*, 12 Cox. C. C. 59.

³ *Buster v. Newkirk*, 20 Johns. (N. Y.) 75.

⁴ *Reg. v. Shickle*, L. R. 1 C. C. 158, C. 251, K. 251.

⁵ 2 Bl. Com. 193; *Rex v. Searing*, R. & R. 350, C. 248, K. 244, M. 639; *Ward v. S.*, 48 Ala. 161; *Norton v. Ladd*, 5 N. H. 203.

⁶ *Reg. v. Cheafor*, 5 Cox C. C. 367; *Reg. v. Gallears*, 1 Den. C. C. 501; *S. v. House*, 65 N. C. 315.

⁷ *Norton v. Ladd*, *ante*; *Warren v. S.*, 1 Greene (Ia.), 106; *S. v. Holder*, 81 N. C. 527; *S. v. Lymus*, 26 O. St. 400.

⁸ *P. v. Maloney*, 1 Parker C. C. 503; *P. v. Campbell*, 4 Parker C. C. 386; *Mullaly v. P.*, 86 N. Y. 365, C. 248; *accord*, *Hamby v. Sampson*, 105 Ia. 112, 74 N. W. 918; *Rockwell v. Judge*, 133 Mich. 11, 94 N. W. 378; *S. v. Langford*, 55 S. C. 322, 33 S. E. 370; *S. v. Brown*, 9 Baxt. (Tenn.) 53; *Hurley v. S.*, 30 Tex. App. 333, 17 S. W. 455. See also *Haywood v. S.*, 41 Ark. 479, M. 644; *S. v. Butler*, 2 Penne. (Del.) 127, 43 Atl. 480.

⁹ *Reg. v. Wortley*, 1 Den. C. C. 162.

from the vein,¹ they may become the subject of larceny, unless the detachment or severance be part and parcel of the act of taking,² in which case the taking is but a trespass, — “a subtlety in the legal notions of our ancestors.”³

It was formerly held that a day must elapse between the severance and the taking in order to constitute larceny ; but it is now more reasonably laid down that the lapse of time between the act of severance and the act of taking need be only so long as is necessary to make the two acts appreciably distinct, and the latter successive to the former.⁴

A difficult question, however, remains ; namely, what is necessary in order to make the acts of severance and taking distinct. The mere fact that there are physically two acts is not enough. There must be something which will give an intervening possession to the owner of the soil ; otherwise, there is no taking out of the owner's possession, for he has had no possession of the chattel as an article of personal property prior to its severance from the realty. If the owner, or a servant for him, takes possession of the goods after severance, any subsequent taking is no doubt larceny. If there is mere lapse of time, it must, in order to justify conviction, be long enough for the jury to find that possession has vested in the owner. No doubt, such lapse of time as would indicate an abandonment by the wrong doer of his intention to take the chattels would be enough ; and if the chattels were so left on the owner's land that the wrong doer lost the power of control of them, the possession would rest in the owner, and a subsequent taking would be larceny. But where the possession of the wrong doer is continuous from the time of severance to the time of taking there is no larceny.⁵

¹ *S. v. Berryman*, 8 Nev. 262, 1 Green's Cr. Law Rep. 335, and note ; *S. v. Burt*, 64 N. C. 619.

² *Reg. v. Townley*, L. R. 1 C. C. 315, 12 Cox C. C. 59, C. 256, K. 255, M. 654 ; *S. v. Hall*, 5 Harr. (Del.) 492.

³ 4 Bl. Com. 232. See *P. v. Williams*, 35 Cal. 671, C. 253.

⁴ *P. v. Williams*, *ante* ; *S. v. Berryman*, *ante* ; *S. v. King*, 98 N. C. 648, 4 S. E. 44 ; *Jackson v. S.*, 11 O. St. 104 ; *Bell v. S.*, 4 Baxt. (Tenn.) 426.

⁵ *Reg. v. Foley*, 26 L. R. (Ir.) 299, 17 Cox C. C. 142, K. 241. See especially the dissenting opinion of Palles, C. B.

This distinction has not, however, always been kept in mind by the courts; and the rule has sometimes been laid down as if it were a question of simply the physical acts.¹

The same principles apply where wild animals are reduced into possession by a trespasser. The property in such animals vests in the owner of the soil,² but the trespasser who takes them is not guilty of larceny unless the possession vested in the owner before the taking. If the trespasser conceals the animals on the land for a short time before removing them, he is not guilty of larceny when he takes them away.³

§ 276. **Value.** — The goods must be of some value, else they cannot have the quality of property. The common law held bills, notes, bonds, and choses in action generally, as of no intrinsic value, and therefore not subjects of larceny.⁴ Now, by statute, most of the old limitations and restrictions are done away with. Many articles savoring of the realty, and most if not all choses in action, are made subjects of larceny. The value may be very trifling;⁵ yet no doubt must be appreciable,⁶ though perhaps not necessarily equal to the value of the smallest current coin.⁷ It has been held, however, in Tennessee, that the value of a drink of whiskey is too small to lay the foundation for a complaint for obtaining goods by false pretences, upon the ground that the severity of the penalty shows that the legislature could not have intended that the statute should apply to so trivial an act.⁸

§ 277. **Taking and Carrying away.** — The taking and carrying away which constitute larceny must be the actual caption

¹ *C. v. Steimling*, 156 Pa. 400, 27 Atl. 297, M. 659; *Bradford v. S.*, 6 Lea (Tenn.), 634; *Jackson v. S.*, *ante*. In Texas the rule of the common law is not in force, *Alvia v. S.*, 42 Tex. Cr. R. 424, 60 S. W. 551; so in Wisconsin by statute, *Goloubieski v. S.*, 101 Wis. 333, 77 N. W. 189.

² *Blades v. Higgs*, 11 H. L. C. 621.

³ *Reg. v. Townley*, L. R. 1 C. C. 315, 12 Cox C. C. 59, C. 256, K. 255, M. 654; *Reg. v. Petch*, 14 Cox C. C. 116, C. 260.

⁴ 4 Bl. Com. 234; *ante*, § 272.

⁵ *P. v. Wiley*, 3 Hill (N. Y.), 194.

⁶ *Payne v. P.*, 6 Johns. (N. Y.) 103.

⁷ *Reg. v. Bingley*, 5 C. & P. 602.

⁸ *Chapman v. S.*, 2 Head (Tenn.), 36.

of the property by the thief into his possession and control, and its removal from the place where it was at the time of the caption. The possession, however, need be but for an instant, and the removal need extend no further than a mere change of place. Thus, if a horse be taken in one part of a field and led to another, the taking and carrying away are complete; or if the goods be removed from one part of a house, store, or wagon to another,¹ or if money in a drawer or in the pocket of a person be actually lifted in the hand of the thief from its place in the drawer or pocket, though not withdrawn from the drawer or pocket, and though dropped or returned on discovery to the place from which it was lifted or taken, after a merely temporary possession, however brief,² the larceny is complete. So where the defendant snatched A's chain from the buttonhole where it was fastened and it caught on a lower button there was a sufficient possession by the defendant to constitute larceny.³ The lifting of a bag from its place would be a larceny,⁴ while the raising it up and setting it on end, preparatory to taking it away, would not.⁵

But if the property is not, at least for a moment, in the entire control of the taker, there is no larceny. Thus where the defendant compels A to lay down his bundle, but is frightened away before he can seize it,⁶ or simply knocks money from A's hand,⁷ or attempts to steal an overcoat on a dummy secured by a chain, and is arrested before he can break the chain,⁸ there is no larceny. So where he attempts

¹ *S. v. Gazell*, 30 Mo. 92; *S. v. Taylor*, 136 Mo. 66, 37 S. W. 907; *Johnson v. P.*, 4 Denio (N. Y.), 364; *S. v. Craige*, 89 N. C. 475.

² *Rex v. Thompson*, 1 Moo. C. C. 78, K. 221, M. 674; *C. v. Luckis*, 99 Mass. 431; *Harrison v. P.*, 50 N. Y. 518; *Eckels v. S.*, 20 O. St. 508; *S. v. Chambers*, 22 W. Va. 779.

³ *Rex v. Lapiet*, 2 East P. C. 557, K. 222; *Reg. v. Simpson*, 1 Dears. C. C. 421, M. 675.

⁴ *Rex v. Walsh*, 1 Moo. C. C. 14, C. 380, K. 220.

⁵ *Cherry's Case*, 2 East P. C. 556, K. 218, M. 673; *S. v. Jones*, 65 N. C. 395.

⁶ *Rex v. Farral*, 2 East P. C. 557.

⁷ *Thompson v. S.*, 94 Ala. 535, 10 So. 520.

⁸ *P. v. Meyer*, 75 Cal. 383, 17 P. 431; *accord*: *Anon.*, 2 East P. C. 556; *Wilkinson's Case*, *ibid.*

to unscrew a shirt stud and is arrested before he has detached it;¹ or simply touches the money in a person's pocket.²

Similarly, if the defendant although having taken possession of the goods, has not moved them, there is lacking the asportation necessary to constitute larceny. Thus where A kills an animal and partly skins it, thereby taking possession of it, but does not move it, he is not guilty of larceny.³ So where A points out a horse in B's yard as his, and purports to sell it to C, but is detected before C takes it away.⁴ If C in good faith drives away the animal it is, of course, larceny by A.⁵

Taking ordinarily implies a certain degree of force, such as may be necessary to remove or take into possession the articles stolen; but the enticement or tolling away of a horse or other animal by the offer of food is doubtless as much a larcenous taking as the actual leading of it away by a rope attached.⁶ So taking porter by making a hole in the barrel through which the liquor runs out by gravity,⁷ or taking goods from an automatic slot machine by dropping into it a brass disk is larceny.⁸ So taking by stratagem, or through the agency of an innocent party, or by a resort to and use of legal proceedings, whereby, under forms of law, possession is got by a person, with the intent of stealing, is a sufficient

¹ *Rodriquez v. S.* (Tex.), 71 S. W. 596.

² *Tarrango v. S.*, 44 Tex. Cr. R. 385, 71 S. W. 597. Compare with the above, *C. v. Barry*, 125 Mass. 390.

³ *Molton v. S.*, 105 Ala. 18, 16 So. 795; *S. v. Alexander*, 74 N. C. 232, M. 681. But the slightest moving will suffice: *Kemp v. S.*, 89 Ala. 52, 7 So. 413; *Lundy v. S.*, 60 Ga. 143; *S. v. Gilbert*, 68 Vt. 188, 34 Atl. 697.

⁴ *Long v. S.*, 44 Fla. 134, 32 So. 870; *Hardeman v. S.*, 12 Tex. App. 207; *Johnson v. S.*, 34 Tex. Cr. R. 254, 30 S. W. 228.

⁵ *S. v. Hunt*, 45 Ia. 673; *Cummins v. C.*, 5 Ky. L. Rep. 200, M. 682; *Walls v. S.*, 43 Tex. Cr. R. 70, 63 S. W. 328. Compare *Reg. v. Jones*, 1 C. & M. 611, M. 764; *Rex v. Pitman*, 2 C. & P. 423, K. 213.

⁶ *S. v. Wisdom*, 8 Porter (Ala.), 511; *Edmonds v. S.*, 70 Ala. 8; *S. v. Whyte*, 2 N. & McC. (S. C.) 174.

⁷ *Reg. v. Wallis*, 3 Cox C. C. 67, M. 678; *ante*, § 263.

⁸ *Reg. v. Hands*, 16 Cox C. C. 188, C. 383.

taking to make the act larcenous.¹ In such cases the fraud is said to supply the place of force. So it is larceny to take gas by tapping a gaspipe and allowing the gas to flow to one's burner without passing through the meter.²

The taking and carrying away must be without the consent of the owner. Where the owner does not, either personally or by his agent, transfer possession to the defendant but authorizes the latter to take possession for certain purposes or upon complying with certain conditions, if the defendant takes possession otherwise than in accordance with this qualified consent, it is larceny. Thus the slot machine case where consent to the taking of possession is conditioned on the dropping in of a legal coin; so where the defendant as a cotton sampler was authorized to take sufficient cotton for a sample; the taking of more than was necessary for that purpose was larceny.³ So where A puts a box of matches on the counter to be used for lighting pipes and B takes the whole box.⁴

§ 277a. **Larceny by Trick.** It is now well established that if the consent of the owner to part with the possession is secured by the fraud or deceit of the defendant, the taking, if done *animo furandi*, will amount to larceny. Thus where the defendant induces the prosecutor to entrust him with funds for the prosecutor's relatives;⁵ so where a person by a trick gets himself appointed agent, which gives him possession of the goods, a misdealing with them *animo furandi* constitutes larceny.⁶ So where defendant gets possession of a deed for a pretended temporary purpose and then records

¹ *Rex v. Summers*, 3 Salk. 194; *Reg. v. Solomons*, 17 Cox C. C. 93; *C. v. Barry*, 125 Mass. 390.

² *Reg. v. Firth*, L. R. 1 C. C. 172; *Reg. v. White*, 6 Cox C. C. 213, C. 381, M. 679; *C. v. Shaw*, 4 All. (Mass.) 308.

³ *S. v. MacRae*, 111 N. C. 665, 16 S. E. 173.

⁴ *Mitchum v. S.*, 45 Ala. 29, M. 711. See also *Washington v. S.*, 106 Ala. 58, 17 So. 546; *S. v. Meldrum*, 41 Or. 380, 70 P. 526; *Peck v. S.*, 9 Tex. App. 70. Compare *Carrier's Case* Y. B. 13 Ed. IV, 9, pl. 5, C. 296, K. 223, M. 734, opinion of Laicon, J.

⁵ *Macino v. P.*, 12 Hun (N. Y.), 127.

⁶ *Case v. S.*, 26 Ala. 17.

it, this is larceny.¹ So where defendant by falsely pretending to be the person for whom a letter is sent induces the postmaster to deliver it to a third person at his order.²

It has also been said that where the bailee takes the property *animo furandi* the offence of larceny is complete.³ If the bailee has by word or act fraudulently induced the delivery, the case is clear; if, however, he does nothing to deceive, it would seem difficult to bring the case within the ordinary principles of larceny. So where the defendant took a watch from the owner who allowed him to do so under the belief that he would keep it for him this was held no larceny.⁴ Ordinarily, however, the facts show that the consent of the owner to the delivery of possession was due, either directly or indirectly, to the deceit of the defendant, or that there was no consent at all.⁵

§ 278. **Obtaining of Title.**—The law holds, somewhat inconsistently, that if possession only be obtained by fraud the

¹ *S. v. Hall*, 85 Mo. 669.

² *Reg. v. Kay*, 7 Cox C. C. 289, M. 690. For other instances of larceny by trick see *Rex v. Semple*, 1 Leach, 4th ed. 420, M. 742; *Rex v. Hench*, R. & R. 163, K. 264; *Verberg v. S.*, 137 Ala. 73, 34 So. 818; *P. v. Campbell*, 127 Cal. 278, 59 P. 593; *Finkelstein v. S.*, 105 Ga. 617, 31 S. E. 589; *Bergman v. P.*, 177 Ill. 244, 52 N. E. 363; *Crum v. S.*, 148 Ind. 401, 47 N. E. 833; *P. v. Woodruff*, 47 Kan. 151, 27 P. 842; *C. v. Flynn*, 167 Mass. 460, 45 N. E. 924; *S. v. Lindenthal*, 5 Rich. Law (S. C.), 237.

A fortiori it is larceny where the possession is taken by a combination of fraud and force at once deceiving and overpowering the owner, *Reg. v. McGrath*, L. R. 1 C. C. R. 205, 11 Cox C. C. 347, K. 262, M. 792.

And *semble* it is larceny if consent is fraudulently procured to any one of the elements of the crime. Thus where the defendant, *animo furandi*, took possession of a hog but the asportation was with the consent of the owner, the fact that the consent was procured by fraud made the crime larceny, *Frazier v. S.*, 85 Ala. 17, 4 So. 691.

³ *S. v. Thurston*, 2 McMull. (S. C.) 382. See also *Reg. v. Evans*, C. & M. 632, M. 732; *Reg. v. Hey*, 2 C. & K. 983; *Rex v. Stock*, 1 Moo. C. C. 87; *Johnson v. P.*, 113 Ill. 99.

⁴ *Reg. v. Reeves*, 5 Jurist (N. S.), 716, M. 708.

⁵ *Shafer v. S.* (Ala.), 8 So. 670; *Fitzgerald v. S.*, 118 Ga. 855, 45 S. E. 666; *S. v. Fisher*, 106 Ia. 658, 77 N. W. 456; *Harris v. S.* (Tex.), 65 S. W. 921.

offence is larceny, but if possession and a title to the property be obtained by fraud, it is not, as the fraud nullifies the consent to the taking, but not the consent that the title should pass.¹ And this inconsistency arises out of the doctrine generally received that trespass is a necessary ingredient in larceny, and while a man may be a trespasser who holds goods by a possession fraudulently obtained, he cannot be a trespasser by holding goods by a title fraudulently obtained.² The consent of the owner, procured by fraud, that he shall have title, takes the case out of the category of larceny. But if by the same fraud the possession and title to goods are obtained from a servant, agent, or bailee of the owner, who has no right to give either possession or title, as where a watch repairer delivers the watch to a person who personates the owner, it is larceny.³ It is difficult to see, except upon the technical ground above stated, why a title procured by fraud is any more by consent of the owner than a possession so procured. The distinction is a source of confusion, not to say a ground of reproach.

It follows, therefore, that in case of larceny by trick, the question is whether or not the owner intended to pass title; ⁴ if he did so intend, the offence is obtaining by false pretences; if he intended to pass only possession the offence is larceny. The following cases will illustrate the distinction. A, while in B's company, pretends to find a valuable object; he admits B's right to share therein and proposes to sell B his (A's) share; B agrees and pays A for his interest in what turns out to be a worthless article; this is obtaining money by false pretences as A intended to part with the title to his money, as well as the possession thereof;⁵ so where A by pretending to put 3 shillings into a purse induces B to pay him 1 shilling

¹ Reg. v. Prince, L. R. 1 C. C. 150, 11 Cox C. C. 193, C. 270.

² See 2 Bish. New Cr. Law, §§ 808-812.

³ Ibid.; C. v. Collins, 12 All. (Mass.) 181; S. v. Koplan, 167 Mo. 298, 66 S. W. 967; Hite v. S., 9 Yerg. (Tenn.) 198.

⁴ Reg. v. Bunce, 1 F. & F. 523, C. 314; Reg. v. Buckmaster, 16 Cox C. C. 339, C. 316; Reg. v. Middleton, L. R. 2 C. C. 38, K. 266, M. 794.

⁵ Reg. v. Wilson, 8 C. & P. 111, K. 348, M. 779.

therefor;¹ so where A, pretending to put money in B's till, deceives B into giving him a larger amount of money than is really due him;² so where A by falsely pretending to B that he can dispose of goods for him, induces B to ship the goods to him and send him the bill of lading therefor;³ so where the defendant, by falsely pretending to be ill, induces A to give him money to buy medicine.⁴ On the other hand, where in the case of pretended finding of a valuable object, the trickster left it with the victim and received from him certain coins as a pledge for the safe keeping of the find till the next day, this was larceny by trick, since the prosecutor did not intend to part with his property in the coins, but only the temporary possession;⁵ so where the defendant induces A to deliver to him certain property, giving therefor worthless notes, or promising to pay therefor at a given time; this is larceny by trick where the contract provides that title shall remain in A till the payment is actually made;⁶ so where, although there was no express contract, the jury find that it was in fact the intention of the owner not to part with the title until he had received payment.⁷

¹ *Reg. v. Solomons*, 17 Cox C. C. 93.

² *Reg. v. Williams*, 7 Cox C. C. 355, M. 786.

³ *Zink v. P.*, 77 N. Y. 114.

⁴ *Collins v. S.*, 15 Lea (Tenn.), 68. Compare *Pease v. S.*, 94 Ga. 615, 21 S. E. 588.

⁵ *Rex v. Patch*, Leach, 3d ed. 273, M. 778; *Rex v. Moore*, Leach, 3d ed. 354.

⁶ *Rex v. Pratt*, 1 Moo. C. C. 250; *P. v. Rasche*, 73 Cal. 378, 15 P. 13; *March v. S.*, 117 Ind. 547, 20 N. E. 444; *Weyman v. P.*, 4 Hun (N. Y.), 511; *Martin v. Terr.*, 4 Okl. 105, 43 P. 1067.

⁷ *Reg. v. Cohen*, 2 Den. C. C. 249, M. 769. The same principles apply to the gambling cases. If A is induced by B to deposit money with B's confederate as stakeholder, the latter gets custody, or, at most, a possession by trick and his retention is larceny: *Rex v. Robson*, R. & R. 413, M. 783; *P. v. Shaughnessy*, 110 Cal. 598, 43 P. 2; *U. S. v. Murphy*, McArth. & M. (D. C.) 375; *P. v. Stinson*, 43 Ill. 397; *Defrese v. S.*, 3 Heisk. (Tenn.) 53; *S. v. Skilbrick*, 25 Wash. 555, 66 P. 53, M. 785; so where the prosecutor is induced by a trick to "stake" one of the confederates: *Doss v. P.*, 158 Ill. 660, 41 N. E. 1093; *Miller v. C.*, 78 Ky. 15; *P. v. Shaw*, 57 Mich. 403, 24 N. W. 121; *P. v. Loomis*, 67 N. Y. 322. On the other hand, if the prosecutor is induced by the fraud to

§ 278a. **Larceny by Trick from Servant.** — In the case of larceny of goods in the custody of a servant the question is two-fold: first, whether the servant had the power of passing title, and second, whether he intended to do so. If a servant or agent who has general control of the business of the master with power to pass both possession and property in the ordinary course of business, is tricked into disposing of the goods of the master, meaning to pass both possession and property, his act is as effectual in this regard as would be the act of the master; and consequently the offence is not larceny but obtaining by false pretences. Thus, where in one case, a clerk in general charge of a pawnshop, and in another a teller in a bank, were deceived into paying out money on worthless securities or notes, the crime was held not to be larceny.¹

In principle, it would seem that the difference between a servant with general power to pass title and one with limited powers, was of degree rather than of kind. In either case, the servant must determine when the circumstances, broad or narrow, have arisen under which he can pass title. Hence, although the states of fact under which a servant with limited power can pass title may be few or even limited to a single instance, if that particular state of facts seems to him, although erroneously, to exist and he then acts for his master and with intent to pass title, it would seem that he could do so as effectually as could the servant with general powers had he been similarly deceived. Consequently the crime would be here, as before, not larceny but false pretences.²

As a matter of decision, however, in the case of a servant believe that he has lost the wager and consents to the passing of the title, this is obtaining by false pretences: *Rex v. Nicholson*, Leach, 3d ed. 698, M. 781; *Rex v. Moore*, Leach, 3d ed. 354; compare *S. v. Murphy*, 90 Mo. App. 548; so if he is induced to lend one of the confederates money, relying simply on his promise to pay back: *Reg. v. Riley*, 1 Cox C. C. 98. These principles would seem to have been erroneously applied in *Reg. v. Buckmaster*, 16 Cox C. C. 339, C. 316.

¹ *Rex v. Jackson*, 1 Moo. C. C. 119; *Reg. v. Prince*, L. R. 1 C. C. 150, 11 Cox C. C. 193, C. 270; but compare *Reg. v. Middleton*, L. R. 2 C. C. 38, K. 266, M. 794; and *C. v. Lawless*, 103 Mass. 425.

² *Rex v. Parks*, 2 East P. C. 671, M. 774.

with authority to pass title only under certain narrow conditions, the rule appears to be that where he is tricked into delivering the goods and intends to pass both possession and title, if in reality the circumstances were not those under which he was authorized to pass title, the trickster will get only possession and hence be guilty of larceny by trick. Thus, where a servant is sent with a package and told to deliver it only for cash or its equivalent, and the defendant, by tendering him what the servant believes to be good money but is in reality a counterfeit or a worthless check, persuades him to deliver both possession and title, so far as he can, the crime has been held to be larceny and not false pretences.¹ Of course, if the servant has no power under any circumstances to do anything more than transfer the possession, it is clear that a person receiving goods from him will acquire only possession, and if that is obtained by trick and *animo furandi*, there is a larceny. Thus where the servant of a carrier was induced to leave goods at the wrong destination, it was held larceny.² So where a stable boy is sent to deliver a horse to a person who has already purchased it, and is by trick persuaded to deliver the horse to the defendant.³ The same principle applies to a bailee who has only possession and no authority under any circumstances to transfer the title.⁴

If the servant, having power to pass title under certain circumstances, attempts to pass title not because he believes those circumstances to exist, but entirely independently of such authority, he can pass nothing but possession. Thus where A has authority to sell grain only in the day-time, an attempted sale at night, not being under even color of author-

¹ Reg. v. Stewart, 1 Cox C. C. 174, K. 354, M. 776; Reg. v. Webb, 5 Cox C. C. 154, C. 325; Reg. v. Small, 8 C. & P. 46.

² Reg. v. Little, 10 Cox C. C. 559; Rex v. Longstreath, 1 Moo. C. C. 137.

³ C. v. Rubin, 165 Mass. 453, 43 N. E. 200. Compare Rex v. Pearce, 2 East P. C. 603; Rex v. Wilkins, 2 East P. C. 673; Reg. v. Simpson, 2 Cox C. C. 235.

⁴ Rex v. Campbell, 1 Moo. C. C. 179; C. v. Collins, 12 All. (Mass.) 181; *a fortiori* when the servant or bailee has no power to pass even possession. See § 278, *ante*.

ity, passes only possession.¹ So where A is authorized to deliver certain money to B at three o'clock and C by trick induces A to deliver it to him at one o'clock ;² so where A is sent with a parcel for B with instructions to deliver it only for cash and by collusion with B accepts a worthless check.³ All that the defendant can acquire in such cases is possession, and if the person in charge of the goods had only custody, with not even apparent authority to part with either possession or title under the circumstances, the taking would be not larceny by trick, but *invito domino* in the strict sense of the phrase.

Assuming the power of the servant to transfer the title to the property under the given circumstances, his intent to do so must also exist. For of course if the servant is tricked into giving up the goods without intending to pass title or possession there is larceny. Thus where the servant of a warehouseman delivers goods to a fellow servant upon his representation that their master had sent for them, there was no intent to pass even possession, and a felonious conversion was larceny.⁴ So where a servant is sent with clothing and the defendant persuades the servant to turn over the clothing for examination, this is larceny *invito domino*, or by trick according as the servant meant to pass only custody or the possession.⁵ So also when the possession is obtained by means of a combination of trickery and force.⁶ In general, the same principles as to whether possession or title is intended to pass apply as where the owner himself is dealing with the property.⁷

In Iowa, and perhaps other States, the rule that there is no larceny where there is no trespass, and no trespass where there

¹ *S. v. McCarty*, 17 Minn. 76; *accord*, *Reg. v. Hornby*, 1 C. & K. 305.

² *P. v. McDonald*, 43 N. Y. 61, M. 701; *accord*, *Rex v. Sheppard*, 9 C. & P. 121.

³ *Shipply v. P.*, 86 N. Y. 375.

⁴ *Reg. v. Robins*, Dears. C. C. 418, C. 321.

⁵ *S. v. Hall*, 76 Ia. 85, 40 N. W. 107; *Gardiner v. S.*, 55 N. J. L. 17, 26 Atl. 30; *St. Valarie v. P.*, 64 Barb. (N. Y.) 426. See also *Rex v. Gilbert*, 1 Moo. C. C. 185; *Rex v. Pratt*, *ibid.* 250.

⁶ *P. v. Camp*, 56 Mich. 548; *C. v. Cruikshank*, 138 Pa. 194, 20 Atl. 937.

⁷ See §§ 277a, 278, 285, 317.

is consent obtained by fraud, has been abrogated by statute;¹ and in Tennessee it is said that the fraud constitutes a trespass, such as it is.²

§ 279. **Taking of Custody merely.**—Where one takes the custody of goods merely, as distinguished from possession, the crime of larceny cannot be committed. So where one moves the goods from one portion to another of the owner's shop, in order that they may be more easily stolen, it is not larceny, for no possession is taken. This question will be more fully considered later.³

§ 280. **Taking. Finding Lost Property.**—Lost property found and appropriated may, under certain circumstances, be said to be taken. Thus, if a person find a piece of personal property, about which there are marks or circumstances which afford a clue to the ownership, and from which he has reason to believe that inquiry might result in ascertaining the ownership, and immediately upon finding, without inquiry, appropriate it to his own use, this is a taking sufficient to constitute the act larceny.⁴ And it is not necessary that the means or circumstances which the finder should consider as possible means of identification should be confined to marks upon the object; the mere value of the article may be so great that the finder should reasonably know it could be returned to its owner.⁵ On the other hand, if there be no mark or circumstance giving any reason to suppose that the ownership can be ascertained, an immediate appropriation is not a taking which is larcenous.⁶ If there is not a purpose at the time of finding

¹ *S. v. Brown*, 25 Ia. 561.

² *Defrese v. S.*, 3 Heisk. 53. See also *S. v. Williams*, 35 Mo. 229.

³ *Post*, § 289.

⁴ Compare *Milburne's Case*, 1 Lewin, 251.

⁵ *Brooks v. S.*, 35 O. St. 46, M. 724. In general, to the effect that if for any reason the finder has reasonable grounds for believing that the property can be restored, the taking, *animo furandi*, is larceny, see *Reg. v. Christopher*, 8 Cox C. C. 91; *Reg. v. Moore*, 8 Cox C. C. 416; *S. v. Levy*, 23 Minn. 104; *S. v. Clifford*, 14 Nev. 72; *Baker v. S.*, 29 O. St. 184; *McCarty v. S.*, 36 Tex. Cr. R. 135, 35 S. W. 994.

⁶ *Reg. v. Thurborn*, 1 Den. C. C. 387, C. 332, K. 276, M. 720; *Griggs v. S.*, 58 Ala. 425; *Lane v. P.*, 10 Ill. 305; *S. v. Dean*, 49 Ia. 73; *C. v.*

to appropriate, a subsequent appropriation will not amount to larceny.¹

For this reason, it becomes important to note not only when, but of what, the person takes possession. The law seems to be that a person takes possession of an object only when he not only assumes physical control over it, but does so with the intent to control that object either as a specific object or as one of a class. Thus, where a defendant bought a bureau simply as such, he did not thereby take possession of money in a secret drawer; so that when he did later find the money and assume control over it, *animo furandi*, he was guilty of larceny.² So where the defendant takes possession of what he believes to be an empty trunk and later discovers clothes therein.³ On the other hand, where a canal company ordered the canal to be cleaned with the intent of returning to the owners the lost articles at the bottom thereof, a servant then taking articles therefrom, *animo furandi*, was guilty of larceny from the company;⁴ so where a defendant received a letter containing a draft and other enclosures and received it intending to take whatever was therein, a subsequent conversion of the draft, *animo furandi*, was not larceny.⁵ So where defendant robbed A of his overcoat in which there was, unknown to A, a watch, an instruction that if the defendant did not know at the time that the watch was in the pocket, he could not be convicted of the robbery thereof was rightly refused as it did not leave to the jury the question of his intent to take whatever might be in the coat.⁶

Titus, 116 Mass. 42, 1 Am. Cr. Repts. (Hawley) 416, and note; Beatty v. S., 61 Miss. 18 (*semble*); P. v. Cogdell, 1 Hill (N. Y.), 94; Reed v. S., 8 Tex. App. 40.

¹ Reg. v. Preston, 5 Cox C. C. 390, 2 B. & H. Lead. C. C. 25, and note; Reg. v. Matthews, 12 Cox C. C. 489, M. 333; Ransom v. S., 22 Conn. 153; Baker v. S., 29 O. St. 184; P. v. Anderson, 14 Johns. Rep. (N. Y.) 294; S. v. Arkle, 116 N. C. 1017, 21 S. E. 408; Gosler v. S. (Tex.), 56 S. W. 61.

² Merry v. Green, 7 M. & W. 623, C. 217, M. 715; Cartwright v. Green, 8 Vez. 405, C. 215; Durfee v. Jones, 11 R. I. 588.

³ Robinson v. S., 11 Tex. App. 403. ⁴ Reg. v. Rowe, Bell C. C. 93.

⁵ Rex v. Mucklow, 1 Moo. C. C. 160.

⁶ Stevens v. S., 19 Neb. 647, 28 N. W. 304. Compare, on the general question of possession, Holmes Common Law, ch. vi.

§ 281. **Property Left by Mistake.** — It is important to observe the distinction between lost and mislaid property. In the latter case, as where a customer unintentionally leaves his purse upon the counter of a store,¹ and the trader takes it and appropriates it to his own use without knowing whose it is, or a passenger unintentionally leaves his baggage at a railway station,² and a servant of the company, whose duty it is to report the fact to his superior, neglects to do so, and appropriates the baggage to his own use, the act in each case is larceny, because there was a likelihood that the owner would call for the property, and therefore in neither case at the time of appropriation was the property strictly lost property. There was a probability known to the taker in each case that the owner might be found, i. e., would appear and claim property which he had by mistake left. But the mere fact that the servant has the duty of turning over the property to his master will not make a taking thereof larceny, although it may impose a civil liability.³

§ 282. **Property Delivered by Mistake.** — Where one receives from another, — the delivery being by mistake and therefore unintentional, — a sum of money or other property, and the receiver at the time knows of the mistake, yet intends to keep it and appropriate it to his own use, this has been held to be a taking sufficient to constitute larceny; as where a depositor in a savings bank, presenting a warrant for ten dollars, receives through a mistake of the clerk a hundred

¹ *Reg. v. West*, 6 Cox C. C. 415; *Lawrence v. S.*, 1 Humph. (Tenn.) 228, M. 728.

² *Reg. v. Pierce*, 6 Cox C. C. 117, C. 334. See also *Rex v. Wynne*, 2 East P. C. 664; *Reg. v. West*, Dears. 402; *S. v. McCann*, 19 Mo. 249; *S. v. Farrow*, Phillips (N. C.), 161; *Pritchett v. S.*, 2 Sneed (Tenn.), 285; *Pyland v. S.*, 4 Sneed (Tenn.), 357.

³ *Water Co. v. Sharman* [1896] 2 Q. B. D. 44. As to the respective rights of finders of lost goods and the owner of the property whereon they are found, see *Amory v. Delamirie*, 1 Str. 505; *Elwes v. Gas Co.*, 33 Ch. Div. 562; *Bridges v. Hawksworth*, 21 L. J. Q. B. 75; *Bowen v. Sullivan*, 62 Ind. 281; *McAvoy v. Medina*, 11 All. (Mass.) 548; *Hamaker v. Blanchard*, 90 Pa. St. 377.

dollars.¹ The objection to this view as a matter of principle is that the person in possession of the coin does, as a matter of fact, intend to transfer possession to the person before him, and the latter intends to take possession; and though he may do so *animo furandi*, it is difficult to see that it is done *invito domino*.²

If the receiver did not know of the mistake at the time of taking, his intention to appropriate, formed later, will not make the act larceny.³ So where a mail carrier delivers a letter to the wrong person and the latter takes it in good faith, and later, discovering the mistake, keeps it, there is no larceny.⁴ This latter principle would seem to apply where one receives a coin of large value by mistake for one of smaller value, and afterwards, on discovering the mistake, appropriates it. This should not be held larceny.⁵ So where a child gave a \$20 gold piece to the defendant and he took it with no intent to steal, although knowing what the coin was, and on discovering that the child believed it was a dollar determined to keep the coin, the offence was held not to be larceny.⁶ The later discovery here was not of the nature of the coin but of the mind of the owner, but the principle would seem to be the same as in the other cases.

§ 283. **Taking. Servant.**—Where property is taken by a servant, in whose custody it is placed by the master, as of goods in a store for sale, or of horses in a stable for hiring,

¹ Reg. v. Middleton, L. R. 2 C. C. 38, 12 Cox C. C. 260, 417, 1 Green's Cr. Law Rep. 4, K. 266, M. 794; Wolfstein v. P., 6 Hun (N. Y.), 121; Thompson v. S. (Tex.), 55 S. W. 330.

² See the dissenting opinion of Bramwell, B., in Reg. v. Middleton, *ante*.

³ Reg. v. Flowers, 16 Cox C. C. 33, C. 229.

⁴ Rex v. Mucklow, 1 Moo. C. C. 160; Reg. v. Davies, Dears. C. C. 640.

⁵ Bailey v. S., 58 Ala. 414; *accord*, Reg. v. Jacobs, 12 Cox C. C. 151; Reg. v. Hehier [1895] 2 Ir. 709, K. 300, M. 747; Cooper v. C., 22 Ky. L. R. 1627, 60 S. W. 938; *contra*, S. v. Ducker, 8 Or. 394; Bergeron v. Peyton, 106 Wis. 377, 82 N. W. 291 (statutory). See Reg. v. Ashwell, L. R. 16 Q. B. D. 190, 16 Cox C. C. 1, C. 220, K. 292, where the English judges were equally divided on the question.

⁶ Jones v. S., 97 Ga. 430, 25 S. E. 319.

or of securities of a banker, or of money in a table, all the property being still in the possession of the owner by and through the servant, the act of taking by the servant is larceny. The servant has custody merely for the owner, who has the possession and property.¹ And the servant need not be a general one; the possession still remains in the master even though the relation be created only for a particular transaction.² The question of possession is independent of any actual control by the master. Thus where a master sends his servant away with a bill to cash, or goods to deliver, the property, though in the actual control of the servant, is still in the possession of the master.³ But the property must be entrusted to the servant as such.⁴

If, however, the servant receives goods for his master from a third person, he is held to get the possession, and not merely the custody, and an appropriation of the goods is therefore not larceny.⁵ And so where the servant receives goods from a

¹ *Crocheron v. S.*, 86 Ala. 64, 5 So. 649; *Powell v. S.*, 34 Ark. 693; *P. v. Perini*, 94 Cal. 573, 29 P. 1027; *Marcus v. S.*, 26 Ind. 101; *Gill v. Bright*, 6 T. B. Mon. (Ky.) 130; *C. v. Berry*, 99 Mass. 428; *P. v. Wood*, 2 Park. C. C. (N. Y.) 22; *S. v. Jarvis*, 63 N. C. 556; *Roeder v. S.*, 39 Tex. Cr. R. 199, 45 S. W. 570. Compare *Bismarck v. S.*, (Tex.), 73 S. W. 965.

² *Reg. v. Harvey*, 9 C. & P. 353. See *Reg. v. Jones*, 1 C. & M. 611, M. 764; *Rex v. Hughes*, 1 Moo. C. C. 370. Compare *Reg. v. Goodbody*, 8 C. & P. 665; *Reg. v. Hey*, 2 C. & K. 983; *Reg. v. Gibbs*, 6 Cox C. C. 455; *post*, § 300.

³ *Rex v. Paradise*, 2 East P. C. 565, M. 762; *Rex v. Lavander*, 2 East P. C. 566; *Reg. v. Heath*, 2 Moo. C. C. 33; *Reg. v. Perry*, 1 Den. C. C. 69; *S. v. Schingen*, 20 Wis. 74. Compare *Mobley v. S.*, 114 Ga. 544, 40 S. E. 728.

The rule seems to have been formerly somewhat unsettled upon this point, some of the cases making the question turn on the actual control of the goods independently of the relation of master and servant. The statute 21 H. VIII. ch. 7, which provided that where goods were delivered by a master to his servant to keep, any embezzlement thereof by the servant was larceny, was said to be simply declaratory of the common law, *Rex v. Wilkins*, 1 Leach, 4th ed. 520. See also Note, Y. B. 3 H. VIII. 12, pl. 9, M. 761; Note, *Dyer* 5 a; *Rex v. Watson*, 2 East P. C. 562.

⁴ *S. v. Fann*, 65 N. C. 317.

⁵ *Reg. v. Masters*, 1 Den. C. C. 332, C. 310, K. 319, M. 689; *Rex v. Bazeley*, Leach, 4th ed. 835, K. 305; *Rex v. Sullens*, 1 Moo. C. C. 129,

fellow servant, the latter having possession and not transferring the goods to the former as the "ultimate destination" thereof.¹ But if one servant receives goods from another servant having custody, only custody passes; the goods are still in the master's possession, and the servant may steal them.²

Still further, if the servant who has taken possession of the goods puts them in the place appropriated for their reception by the master, the latter comes at once into possession, and the servant taking the goods thereafter is guilty of larceny. Such is the case where money is put by a clerk into the till, or documents into the file provided for them;³ and so where a servant, sent with a cart to get goods of the master, has put them in the cart.⁴ But where the goods are put into the master's receptacle, not in the course of employment, but merely as a place of temporary concealment until they can finally be taken away, the possession is still in the servant, and the taking is not larceny.⁵ So where a servant who has received money for his master, deposits it in his own room in his master's house, and later takes it away, this is not larceny.⁶

§ 284. **Taking. Bailee.** — The appropriation by a carrier, however, or other bailee, of property of which he has possession, and in which he has therefore a quasi property, is embezzlement, and not larceny.⁷ And it is immaterial whether the possession has been given by the owner or simply taken without objection by him and in good faith. Unless at the

K. 320, M. 688; *Rex v. Hawtin*, 7 C. & P. 281; *C. v. King*, 9 Cush. (Mass.) 284.

¹ *Reg. v. Masters*, *ante*. Compare *Reg. v. Watts*, 2 Den. C. C. 14, C. 312.

² *Rex v. Murray*, 1 Moo. C. C. 276, C. 310, K. 318.

³ *Reg. v. Watts*, *ante*.

⁴ *Reg. v. Reed*, 6 Cox C. C. 284, Dears. C. C. 257, C. 232, M. 692; *Reg. v. Hayward*, 1 C. & K. 518, K. 321; *Reg. v. Norval*, 1 Cox C. C. 95; *Rex v. Mallison*, 86 L. T. 600.

⁵ *Rex v. Bull*, 2 East P. C. 572, M. 686; *C. v. Ryan*, 155 Mass. 523, 30 N. E. 364.

⁶ *Rex v. Dingley*, Show. 53, M. 684.

⁷ *Rex v. Raven*, Kel. 24; *Rex v. Banks*, R. & R. 441; *Reg. v. Thistle*, 3 Cox C. C. 573, C. 291; *P. v. Dalton*, 15 Wend. (N. Y.) 581.

moment of taking the felonious intent exists there can be no larceny.¹ Thus where A in good faith, in rescuing goods from a fire, took possession of them without objection by the owner, a subsequent keeping of them *animo furandi* was held not larceny.² So where A made a conveyance of certain goods to trustees but they were not removed, a felonious conversion of them by him was no larceny, since they had throughout remained in his possession.³ The possession of a servant is different from that of a bailee. That of the former is mere custody, while that of the latter is a real possession. Thus, as has been seen, money in the till is in the possession of the master, but in the custody of the clerk. But where property is delivered to another, who is not the servant of the person so delivering, to be kept, the possession is in the employee as a trustee, and if he fraudulently converts it, it is embezzlement, and not larceny.⁴

But it has been held that, if the bailee do any act which violates the trust, as where a carrier breaks open a package delivered to him for transportation, and abstracts a part of its contents, he thereby terminates the bailment, and the act is larceny.⁵

This is on the principle that by the breaking of bulk and consequent termination of the bailment the property passes into the constructive possession of the original bailor and the then misdealing with it by the carrier amounts to a new and

¹ *Rex v. Holloway*, 5 C. & P. 524, M. 707.

² *Leigh's Case*, 2 East P. C. 694, M. 731. See *Reg. v. Reeves*, 5 Jur. N. S. 716, M. 708; *Noyes v. S.*, 65 Ga. 754. Compare *Harris v. S.* (Tex.), 65 S. W. 21.

³ *Reg. v. Pratt*, 6 Cox C. C. 373, C. 293.

⁴ *Rex v. Raven*, Kel. 24; *Rex v. Meeres*, 1 Show. 50, M. 730; *Rex v. Banks*, R. & R. 441; *Reg. v. Saward*, 5 Cox C. C. 295, M. 771; *Stillwell v. S.*, 155 Ind. 552, 58 N. E. 709; *Ennis v. S.*, 3 Greene (Ia.), 67; *P. v. Taugher*, 102 Mich. 598, 61 N. W. 66; *Abrams v. P.*, 6 Hun (N. Y.), 491, M. 733; *S. v. Fann*, 65 N. C. 317; *Mangum v. S.*, 38 Tex. Cr. R. 231, 42 S. W. 291.

⁵ *Rex v. Brazier*, Russ. & Ry. 337, C. 300, M. 941; *S. v. Fairclough*, 29 Conn. 47; *C. v. Brown*, 4 Mass. 580; *Nichols v. P.*, 17 N. Y. 114. See also *C. v. James*, 1 Pick. (Mass.) 375, C. 304; and a valuable note of Mr. Heard to the same case, 2 Bennett & Heard Lead. Cr. Cas. 139.

larcenous taking.¹ But where, instead of breaking bulk, the carrier disposes of the entire object bailed to him, then the very act that violates the terms of his bailment passes the possession to a third person ; so that at no time is there a felonious taking from even the constructive possession of the owner, and there is consequently no larceny.² The rule is technical and has been doubted in principle. It being, however, well established, it follows that what amounts to a breaking of bulk must be distinguished with some care. Opening a letter or bundle and removing any of the contents is clearly such ;³ so where the property is delivered in bulk, as wheat.⁴

Where the bailment consists of a number of separate units the rule has been said to be that if, although the bailment is thus capable of being resolved into its integers, it was in fact intended to be delivered and treated as a single mass of indistinguishable units a felonious conversion of any single unit will be larceny as amounting to a breaking of bulk. Thus a taking from a cargo of pig iron or staves of some of the pigs or staves was held larceny.⁵ But where so many sheep are delivered, or so many bundles of hay, the taking of a single sheep⁶ or bundle⁷ is not a breaking of the mass but a conversion of one entire thing and hence no larceny. In other cases it has been held that though the bailment be of separate units a wrongful opening of the enveloping body is a sufficient breaking of bulk to make a taking larceny.⁸

¹ The view on which the earliest carrier's case seems to have been based, so far as it bears on this point (compare p. 262, n. 4) was that the carrier acquired no possession of the contents of the parcel by the bailment but only of the wrapping: *Carrier's Case*, Y. B. 13 Ed. IV. 9, pl. 5, C. 296, K. 223, M. 734; see also *Robinson v. S.*, 1 Coldw. (Tenn.) 120.

² *Rex v. Fletcher*, 4 C. & P. 545; *Reg. v. Cornish*, 1 Dears. 425.

³ *Rex v. Jones*, 7 C. & P. 151; *Reg. v. Jenkins*, 9 C. & P. 38; *Reg. v. Colhoun*, 2 Crawf. & Dix. 57; *S. v. Fairclough*, 29 Conn. 47; *Cheadle v. Buell*, 6 O. 67.

⁴ *C. v. James*, *ante*.

⁵ *Rex v. Howell*, 7 C. & P. 325; *Nichols v. P.*, *ante*.

⁶ *Rex v. Reilly*, Jebb. 51.

⁷ *Rex v. Pratley*, 5 C. & P. 533.

⁸ *Rex v. Madox*, R. & R. 92, C. 301, M. 733; *Rex v. Brazier*, *ante*; *Reg.*

That the carrier was not a common carrier or was acting gratuitously does not affect his liability.¹

§ 285. **Taking. Temporary Delivery upon Conditions.**—If, however, the property be delivered merely for a temporary purpose, without intention to part with it or the possession except upon certain implied conditions, as where a trader hands a hat over his counter to a customer for the purpose of examination, and the customer walks off with it, or a customer hands to a trader a bill out of which to take his pay for goods bought, and to return the change, and the trader refuses the change, it is in each case larceny.² The possession is in each case fraudulently obtained, which is equivalent to a taking without the consent of the owner, in the view of the law. If the possession be fraudulently obtained with intent on the part of the person obtaining it, at the time he receives it, to convert it to his own use, and the person parting with it intends to part with his possession merely, and not with his title to the property, the offence is larceny.³

Perhaps it might justly be said that in such cases the possession is not parted with, the property being in such proximity to the owner that he still has dominion and control over it.⁴ This would seem to be the better view, both as a matter of principle and on the facts. So long as the property remains under the control of the owner and he intends to let another person take possession only after complying with certain conditions, a taking of possession otherwise is obviously *invito domino*. The mere fact that the owner permits manual custody to be taken while he still keeps the object in such close proximity that it is still under his control, and

v. Poyser, 2 Den. C. C. 233, C. 308. *C. v. Brown*, 4 Mass. 580, seems irreconcilable with either of the above rules.

¹ *Reg. v. Jenkins*, *ante*; *Rex v. Fletcher*, *ante*; *S. v. Fairclough*, *ante*.

² *Reg. v. Thompson*, 9 Cox C. C. 244. See *S. v. Hall*, 76 Ia. 85, 40 N. W. 107; *C. v. O'Malley*, 97 Mass. 584; *P. v. Call*, 1 Denio (N. Y.), 120, M. 767.

³ *Rex v. Robson*, Russ. & Ry. 413; *Farrell v. P.*, 16 Ill. 506; *C. v. Barry*, 124 Mass. 325; *Loomis v. P.*, 67 N. Y. 322; *Hildebrand v. P.*, 56 N. Y. 394; *Lewer v. C.*, 15 S. & R. (Pa.) 93.

⁴ *Hildebrand v. P.*, *ante*; 2 East P. C. 683.

hence in his possession, cannot affect the case. Thus where a silk manufacturer delivers raw silk to workmen who work under his eye;¹ so where he allows the defendant to take goods a few feet to examine them,² or money to count it,³ or a note to endorse a payment thereon.⁴ In all such cases the defendant having acquired only custody, if he takes possession does so *invito domino*, and if there is a felonious intent, larcenously.⁵ Thus where defendant acted as attorney for A in buying certain land. He bought it for \$125, but informed A that the price was \$325, of which \$10 was to go to defendant. The parties having met, A laid the money on a table; defendant took it into the next room, paid the seller \$125, and retained the balance. This was held larceny; and it was said that A never gave up the possession to defendant, even though the latter had a right to select \$10 and keep it.⁶

Where the transaction is intended by the owner of the property stolen to be a single one, as where A puts down bills expecting to get gold, the defendant does not acquire even custody, and a taking of possession without complying with the terms proposed is larceny.⁷ So where the owner of goods puts them at defendant's door but intends to keep the entire control of them until he receives his money.⁸

§ 285a. **Bailment for Special Purpose.**—If, however, the possession is voluntarily transferred even though for a specified purpose, a conversion by the bailee is not larceny. Thus where A gives material to B to work on in his own home and return, and B then feloniously converts.⁹ So where A en-

¹ Anon., Kel. 35, M. 761.

² Rex v. Chissers, T. Ray. 275, K. 217.

³ C. v. O'Malley, *ante*.

⁴ P. v. Call, *ante*.

⁵ See also Reg. v. Johnson, 5 Cox C. C. 372, C. 284; Reg. v. Rodway, 9 C. & P. 784; S. v. Walker, 65 Kan. 92, 68 P. 1095.

⁶ C. v. Lannan, 153 Mass. 287, 26 N. E. 858.

⁷ S. v. Huber, 57 Ind. 341; Grunson v. S., 89 Ind. 533; S. v. Anderson, 25 Minn. 66; S. v. Watson, 41 N. H. 533.

⁸ Reg. v. Slowley, 12 Cox C. C. 269.

⁹ Reg. v. Saward, 5 Cox C. C. 295, M. 771; Abrams v. P., 6 Hun (N. Y.), 491, M. 733.

trusts a sovereign to B to take away and get changed; the transaction not being intended to take place under A's control, B has possession of the coin and a later conversion is not larceny.¹ Some cases, however, apparently lay down the rule that where the property is delivered for a special purpose possession does not pass even though the parties do not occupy the relation of master and servant and the property is not so under the direct control of the owner as to be in his possession. Thus where A delivered to B, a hack driver, a bundle to take home for him, a felonious taking by B was held larceny.² So where a bank delivered to a broker a check on which he was to endeavor to raise money, a felonious conversion of the check was held larceny on the ground that the broker had only custody, although he was not a servant. This doctrine can be sustained only by an extension of the technical rule of possession in the case of master and servant.³ The cases actually resting on this ground are too few to make it clear just what is meant by a "special purpose." Many cases apparently resting on this ground are really sustainable on other well-established principles, as larceny by trick⁴ or delivery to a servant, general⁵ or special.⁶

§ 286. **Taking by Owner.** — A general owner may be guilty of larceny of his own goods, if at the time of taking he has no right to their possession, as where one whose property has been attached takes it away with intent to deprive the attaching creditor of his security,⁷ or a part owner of property in

¹ *Reg. v. Thomas*, 9 C. & P. 741, M. 763; *Reg. v. Reynolds*, 2 Cox C. C. 170; and see in general § 284, and cases.

² *Holbrook v. S.*, 107 Ala. 154, 18 So. 109.

³ *P. v. Abbott*, 53 Cal. 284. See also *Reg. v. Smith*, 1 C. & K. 423; *Murphy v. P.*, 104 Ill. 528; *Justices v. P.*, 90 N. Y. 12; *Richards v. C.*, 13 Grat. (Va.) 803.

⁴ *Welsh v. P.*, 17 Ill. 339; *Smith v. P.*, 53 N. Y. 111; and see § 277a, and cases.

⁵ *Reg. v. Low*, 10 Cox C. C. 168; *Reg. v. Beaman*, C. & M. 595; *C. v. Hutchinson*, 2 Pars. Eq. Ca. (Pa.) 384; *U. S. v. Strong*, 2 Cranch C. C. 251, Fed. Cas. No. 16,411.

⁶ *Reg. v. Goode*, 1 C. & M. 582, M. 766; and see § 283, and cases.

⁷ *C. v. Greene*, 111 Mass. 392. See also *P. v. Thompson*, 34 Cal. 671;

the possession of another takes it feloniously.¹ So in any case where the possessor of the property has a right in it which he can enforce against the owner and the taking is with the intent to deprive him of that right. Thus where a pledgor takes from his pledgee,² or a tenant takes his property from the landlord after the latter has acquired a special property therein by levy.³ And so where the bailees are under a liability to third persons.⁴ So where they were liable for duties upon goods unless exported from the country.⁵ So if they are taken by the owner with the intent to charge the bailee therefor.⁶

§ 287. **Taking by Wife.** — The wife of an owner of property cannot commit larceny by taking it from her husband's possession,⁷ even if she is about to elope with an adulterer,⁸ though the latter might be guilty; for a wife cannot have possession of property apart from her husband.⁹

For the same reason, a third person, taking property of the husband jointly with the wife or with her consent, is not guilty of larceny.¹⁰ If, however, the third person takes possession of the property of the husband, as aforesaid, being at the time an

Palmer v. P., 10 Wend. (N. Y.) 165. But if the taking is for the purpose, not of defeating the levy, but to prevent other creditors from attaching, or is under a belief that the owner has the right to the goods as against the officer, the taking is not felonious: C. v. Greene, *ante*; Whiteside v. Lowney, 171 Mass. 431, 50 N. E. 931; Clarke v. S., 41 Neb. 370, 59 N. W. 785; Adams v. S., 45 N. J. L. 448.

¹ Rex v. Wilkinson, Russ. & Ry. 470, C. 273, K. 253; Reg. v. Webster, 9 Cox C. C. 13.

² Henry v. S., 110 Ga. 750, 36 S. E. 55, M. 665; Bruley v. Rose, 57 Ia. 651, 11 N. W. 629.

³ C. v. Shertzer, 3 Lack. Leg. N. (Pa.) 8; *accord*, Tumalty v. Parker, 100 Ill. App. 382; P. v. Long, 50 Mich. 249, 15 N. W. 105.

⁴ Rex v. Bramley, R. & R. 478, C. 276, M. 670.

⁵ Rex v. Wilkinson, *ante*.

⁶ P. v. Thompson, *ante*; S. v. Fitzpatrick, 8 Houst. (Del.) 385, 32 Atl. 1072; Palmer v. P., *ante*.

⁷ Thomas v. Thomas, 51 Ill. 162; S. v. Banks, 48 Ind. 197.

⁸ Reg. v. Kenny, 2 Q. B. D. 307, 13 Cox C. C. 397, C. 359, M. 669; Reg. v. Glassie, 7 Cox C. C. 1.

⁹ Rex v. Willis, 1 Moo. C. C. 375, C. 360, M. 672.

¹⁰ Harrison's Case, 2 East P. C. 559, K. 274; Lamphier v. S., 70 Ind. 317.

adulterer or in contemplation of adultery he is guilty of larceny.¹ This is sometimes put on the ground that under the circumstances the adulterer must know the wife has not the husband's consent to any dealing with the property. This reason, however, hardly seems satisfactory, and the true explanation of the doctrine is probably historical. If the adulterer does not in fact take possession of the goods, the fact that they are in his room does not make him guilty.²

Under the married woman's acts it would seem that the husband may be guilty of larceny of his wife's property.³

§ 288. **Intent to Steal. Claim of Right.** — The taking must also be felonious; that is, with intent to deprive the owner of his property, and without color of right or excuse for the taking.⁴ Therefore a taking under a claim of right, if the claim be made in good faith, however unfounded it may be, is not larcenous.⁵ And it is immaterial whether the claim is on behalf of the defendant himself or some third person for whom he is acting.⁶ But a custom to take fruit, as from boxes of oranges on board a vessel *in transitu*, is neither good in itself, nor as a foundation for a claim of right.⁷ And in general, the claim

¹ *Rex v. Clark*, 1 Moo. C. C. 376, n.; *Reg. v. Tollett*, C. & M. 112; *Reg. v. Featherstone*, 6 Cox C. C. 376, K. 274; *Reg. v. Glassie*, *ante*; *Reg. v. Berry*, 8 Cox C. C. 117; *Reg. v. Harrison*, 12 Cox C. C. 19; *P. v. Schuyler*, 6 Cow. (N. Y.) 572; *contra*, as to the wife's wearing apparel, *Reg. v. Fitch*, D. & B. C. C. 187 (*semble*).

² *Reg. v. Rosenberg*, 1 C. & K. 233.

³ *Hunt v. S.* (Ark.), 79 S. W. 769; *Beasley v. S.*, 138 Ind. 552, 38 N. E. 35. Compare *Overton v. S.*, 43 Tex. 616.

⁴ *Reg. v. Holloway*, 2 C. & K. 942, 3 Cox C. C. 241, 1 Den. C. C. 370, C. 263, K. 285; *S. v. South*, 4 Dutch. (N. J.) 28; *S. v. Ledford*, 67 N. C. 60; *Johnson v. S.*, 36 Tex. 375.

⁵ *Reg. v. Halford*, 11 Cox C. C. 88; *Blair v. S.* (Ark.), 71 S. W. 482; *P. v. Carabin*, 14 Cal. 438; *S. v. Main*, 75 Conn. 55, 52 Atl. 257; *S. v. Pullen*, 3 Penne. (Del.) 184, 50 Atl. 538; *Dean v. S.*, 41 Fla. 291, 26 So. 638; *Hall v. S.*, 34 Ga. 208; *James v. S.*, 114 Ga. 96, 39 S. E. 946; *S. v. Homes*, 17 Mo. 379; *Severance v. Carr*, 43 N. H. 65; *S. v. Fisher*, 70 N. C. 78; and see note in 57 Am. Dec. 271.

⁶ *Rex v. Knight*, 2 East P. C. 510, C. 484; *P. v. Hoagland*, 138 Cal. 338, 71 P. 359; *S. v. Waltz*, 52 Ia. 227; *Chambers v. S.*, 62 Miss. 108; *Tyler v. S.* (Tex.), 70 S. W. 750. Compare *Reg. v. Gardner*, 9 Cox C. C. 253, C. 365.

⁷ *C. v. Doane*, 1 Cush. (Mass.) 5.

must be *bona fide*. Thus where the defendant secreted A's horse to extort a further payment for some land purchased by A, the jury having found that the defendant knew he was not entitled to the money, he was held guilty of larceny of the horse.¹

Taking property with the intent to compel a payment of a debt would seem not to be larceny on the principles above stated, there being no intent to steal.² It has been said, however, that since the law does not allow a person to collect his debt in that way, the taking is larcenous.³ In accordance with the former and apparently better view, it would seem that where A compels B to sell him property, although A may under some circumstances be guilty of an assault or civilly liable, there is no such intent to steal as will make the act larceny.⁴ The question of fact as to the intent of course always remains open and if the price left is less than the value of the goods taken a felonious intent may be found.⁵

§ 289. **Permanent Taking.** — The intent to steal does not exist unless the object of the wrong doer is permanently to deprive the possessor of property of his present interest in it. If the purpose is only a temporary use, the owner's rights in the chattel not being permanently infringed, the purpose is not larcenous.⁶

The distinction is clearly brought out in a series of English cases. In the first, a workman in a tannery was paid accord-

¹ *Reg. v. O'Donnell*, 7 Cox C. C. 337, M. 815; *accord*, *Higginbotham v. S.*, 42 Fla. 573, 29 So. 410; *Currier v. S.*, 157 Ind. 114, 60 N. E. 1023; *S. v. Hunt*, 45 Ia. 673; *S. v. Jones*, 19 N. C. 544.

² *Reg. v. Hemmings*, 4 F. & F. 50; *Reg. v. Wade*, 11 Cox C. C. 549, K. 283; *P. v. Vice*, 21 Cal. 344; *P. v. Walbrun*, 132 Mich. 24, 92 N. W. 494.

³ *Farrell v. P.*, 16 Ill. 506; *C. v. Stebbins*, 8 Gray (Mass.), 492; *Butler v. S.*, 3 Tex. App. 403.

⁴ *Fisherman's Case*, 2 East P. C. 661, M. 807; *Anon.*, 2 East P. C. 662, M. 807; *Beckham v. S. (Tex.)*, 22 S. W. 411; *Young v. S.*, 37 Tex. Cr. R. 457, 36 S. W. 272.

⁵ Compare *Mason v. S.*, 32 Ark. 238; *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089.

⁶ *Reg. v. Gurnsey*, 1 F. & F. 394, C. 350.

ing to the number of skins he dressed. He took a number of dressed skins from the master's storehouse and handed them to the foreman, in order to secure the compensation for dressing them. This was held not to be larceny of the skins; for the workman never even pretended that the skins were not the master's, or that the master had not an immediate right to the possession.¹ In the second case, a workman at a tallow chandler's took some fat from the storehouse and put it in the scales, pretending that it had been brought in for sale. Here the intention was to deprive the master of all his right in the fat, and that he should procure a new right only by purchase; and it was therefore larceny.²

According to this distinction, taking a chattel to be used as a means of escape and then left,³ or for the purpose of inducing the owner to follow it⁴ or to refrain from leaving the house,⁵ or to facilitate the commission of another theft, does not constitute larceny.⁶ Taking property, however, with a design to apply it on a note due to the taker from the owner, is depriving the owner of the specific property.⁷ So is the taking of a railway ticket, with intent to use it, though coupled with the intent to return it after use.⁸ To conceal it from the owner until the latter shall offer a reward for its recovery, or to sell it at a reduced price, is depriving him of a part.⁹ But

¹ *Reg. v. Holloway*, 3 Cox C. C. 241, 2 C. & K. 942, C. 263, K. 285; *Rex v. Webb*, 1 Moo. 431, M. 811; *Reg. v. Poole*, 7 Cox C. C. 373. Compare *Rex v. Richards*, 1 C. & K. 532, M. 813. See, *contra*, *Fort v. S.*, 82 Ala. 50, 2 So. 477.

² *Reg. v. Hall*, 3 C. & P. 409, 3 Cox C. C. 245, C. 282, K. 280; *accord*, *Reg. v. Manning*, 6 Cox C. C. 86, C. 268.

³ *Rex v. Phillips*, 2 East P. C. 662, M. 808; *S. v. York*, 5 Harr. (Del.) 493.

⁴ *Rex v. Dickinson*, Russ. & Ry. 420.

⁵ *Cain v. S.*, 21 Tex. App. 662.

⁶ *Rex v. Crump*, 1 C. & P. 658, K. 284. See also *Rex v. Phillips*, *ante*; *Re Mutchler*, 55 Kan. 164, 40 P. 283; *Mitchell v. Terr.*, 7 Okl. 527, 54 P. 782; *Mahoney v. S.*, 33 Tex. Cr. R. 388, 26 S. W. 622; *Lucas v. S.*, 33 Tex. Cr. R. 290, 26 S. W. 213.

⁷ *C. v. Stebbins*, 8 Gray (Mass.), 492.

⁸ *Reg. v. Beecham*, 5 Cox C. C. 181, C. 335.

⁹ *Reg. v. Peters*, 1 C. & K. 245; *Reg. v. Spurgeon*, 2 Cox C. C. 102; *Reg. v. O'Donnell*, 7 Cox C. C. 337, M. 815; *C. v. Mason*, 105 Mass. 163;

simply to withhold for a time property one has found, in the hope of a reward, is not larceny.¹

Taking goods of another in order to pawn them is larceny, even if the intention is ultimately to redeem and restore them.² A man who takes an execution from an officer who is about to levy upon his goods, and keeps it, under the mistake that he can thereby prevent the levy, hopes to reap an advantage; but such an act is no more larceny than the taking a stick out of a man's hand with which to beat him.³

§ 290. **Taking. Concealment.** — Although the taking be open, and without secrecy or concealment, it may still be theft; and that the act is furtively done is only evidence of the criminal intent.⁴ Yet there is undoubtedly in the popular, if not in the legal, idea of theft, — *furtum*, — an element of secrecy in the taking.⁵ But if the act be fraudulent, and known to the taker to be without right or against right, it is immaterial whether the taking be open or secret. Nor does it seem to be essential that the taker should be animated by any motive of mere pecuniary gain.⁶ And the fraudulent purpose, — the element without which there can be no theft, the act, in the absence of fraud, being only a trespass, — must exist at the time of the taking. The taking must be with a fraudulent intent. The taking without a fraudulent intent, and a conversion afterwards with a fraudulent intent, do not, in general, constitute larceny.⁷

Berry v. S., 31 O. St. 219; Dunn v. S., 34 Tex. Cr. R. 257, 30 S. W. 227.

¹ Reg. v. Gardner, 9 Cox C. C. 253, C. 365; Reg. v. York, 3 Cox C. C. 181; S. v. Arkle, 116 N. C. 1017, 21 S. E. 408; Micheaux v. S., 30 Tex. App. 660, 18 S. W. 550.

² Reg. v. Trebilcock, 7 Cox C. C. 408, C. 339; Reg. v. Phetheon, 9 C. & P. 552, C. 337; Fields v. S., 6 Coldw. (Tenn.) 524; Truslow v. S., 95 Tenn. 189, 31 S. W. 987; *contra*, but *semble* overruled: Rex. v. Wright, 9 C. & P. 554, n., M. 10.

³ Reg. v. Bailey, L. R. 1 C. C. 347, M. 824.

⁴ S. v. Fenn, 41 Conn. 590.

⁵ S. v. Ledford, 67 N. C. 60.

⁶ Reg. v. Jones, 1 Den. C. C. 188; *post*, § 291.

⁷ Rex v. Banks, Russ. & Ry. 441, C. 364; S. v. Shermer, 55 Mo. 83; Wilson v. P., 39 N. Y. 459.

It is held in some cases, however, that while, if the original taking be rightful, a subsequent fraudulent conversion will not make it larceny, yet if the original taking be wrongful, as by a trespass, it will. Thus, if a man hires a horse in good faith to go to a certain place, and afterwards fraudulently converts him to his own use, this is no larceny. If he takes the horse without leave, and afterwards fraudulently converts him, this is larceny.¹ So if, under color of hiring, he gets possession with intent to steal.² And it has even been held by very high authority, that if possession, without intent to steal, be obtained by a false pretence of hiring for one place, when in fact the party intended to go to another and more distant place, and the property be subsequently converted with a felonious intent, this is larceny.³ So if, after a hiring and completion of the journey without felonious intent, instead of delivering the horse to the owner, the hirer converts him to his own use.⁴ This case proceeds upon the ground that the bailment is terminated. And it may be said, generally, that a bailee who receives or gets possession with intent to steal, or fraudulently converts to his own use after his right to the possession as bailee has terminated, is guilty of larceny. In neither case does he hold possession by consent of the owner.⁵

§ 290a. **Continuing Trespass.**— These cases, where the original taking of possession, though wrongful, was not felonious are put on the ground of “continuing trespass” or “continuing taking” i. e., that where the possession is tortiously acquired every moment of detention is a new taking from the owner, and hence at the moment when the felonious intent does arise, that, with the then new constructive taking, furnishes all the elements of larceny.⁶ The statement of the

¹ *Reg. v. Riley*, 6 Cox C. C. 88, Dears. C. C. 149, C. 279, K. 289; *C. v. White*, 11 Cush. (Mass.) 483, M. 708.

² *P. v. Smith*, 23 Cal. 280; *S. v. Williams*, 35 Mo. 229; *S. v. Gorman*, 2 Nott & McCord (S. C.), 90. See also *S. v. Fenn*, 41 Conn. 590.

³ *S. v. Coombs*, 55 Me. 477.

⁴ *Reg. v. Haigh*, 7 Cox C. C. 403.

⁵ See 2 Bish. Cr. Law, §§ 834, 835. See also *ante*, § 284.

⁶ *Reg. v. Riley*, *ante*; *Weaver v. S.*, 77 Ala. 26; *Dozier v. S.*, 130 Ala. 57, 30 So. 396; *S. v. Coombs*, *ante*; *C. v. White*, *ante*; *Beatty v. S.*, 61

doctrine shows its highly artificial character, and the cases are not uniform.¹ Another aspect of the same principle is involved in the question of jurisdiction in one State or country over larcenies committed in another.²

§ 291. **Taking Lucri Causa.**—The taking need not be for pecuniary gain or advantage of the thief, if it is with design wholly to deprive the owner of his property.³ Logically, taking to one's self the absolute and permanent control and disposition of the property of another, with no intention of returning it to him, is an addition to the property of the taker, and in that sense necessarily a gain or advantage, without reference to the mode of control or subsequent disposition. The larceny is complete, and is not the less a larceny because it is committed as a step in the accomplishment of some other act, criminal or otherwise. It was formerly laid down, that unless it appears that it would be of some sort of advantage,⁴ as to enable the offender to make a gift, or to destroy evidence which might be used against him,⁵ the offence would more properly be malicious mischief.⁶ But even those courts which laid down the rule held that this advantage might be of a very trifling character. Thus, it was held in England,⁷ that where it was the duty of a servant to take such beans as were doled out to him by another servant, and split them and feed them

Miss. 18. In *Reg. v. Riley* there would seem to have been no taking of possession until the discovery of the animal, and then clearly *animo furandi*. See § 280.

¹ In accord with what seems the better principle see: *S. v. Riggs*, 8 Ida. 630, 70 P. 947; *Cady v. S.*, 39 Tex. Cr. R. 236, 45 S. W. 568; compare *Rex v. Holloway*, 5 C. & P. 524, K. 288. M. 707; *Nightengale v. S.*, 91 Ga. 95, 21 S. E. 221.

² *Ante*, § 80.

³ *Reg. v. Jones*, 2 C. & K. 236, 1 Den. C. C. 188, C. 346, M. 818; *P. v. Juarez*, 28 Cal. 380; *Hamilton v. S.*, 35 Miss. 214.

⁴ *Reg. v. White*, 9 C. & P. 344.

⁵ *Reg. v. Jones, ante*; *Reg. v. Wynn*, 3 Cox C. C. 271, 1 Den. C. C. 365, C. 352; *Rex v. Cabbage*, Russ. & Ry. 292, C. 344, M. 809.

⁶ *Reg. v. Godfrey*, 8 C. & P. 563; *S. v. Hawkins*, 8 Porter (Ala.), 461; *P. v. Murphy*, 47 Cal. 103.

⁷ *Rex v. Morfit*, Russ. & Ry. 307, C. 315; *Reg. v. Privett*, 2 C. & K. 114, 1 Den. C. C. 193, C. 349, M. 814.

to the horses, and the former clandestinely took a bushel of the beans and fed them to the horses whole, whereby he possibly injured his employer's horses, and saved labor to himself, this was a sufficient taking to constitute larceny. This was an extreme case of doubtful law, and it was immediately changed by statute.¹

But by the better view there is no need of the motive of gain in order to convict of larceny. The permanent injury to the owner is enough.²

§ 292. **Ownership.** — A general or special ownership by another is sufficient to sustain the allegation that the property is his.³ Even a thief has sufficient ownership to support the allegation as against another thief.⁴

§ 293. **Larcenies** from the person, from a vessel, and, under special circumstances, from a building, are but aggravated forms of larceny, of statutory growth, and by statutes generally similar, but in particulars different, are specially defined, and made specially punishable, and are, so far as the larceny is concerned, to be tried by the tests heretofore stated. They are sometimes called compound larcenies, as being made up of two or more distinct crimes, — as in case of larceny from the person, which, technically at least, includes an assault upon the person, — and are said to be *aggravated*, because it indi-

¹ 26 & 27 Vict. c. 103, § 1.

² *Reg. v. Guernsey*, 1 F. & F. 394, C. 350; *Williams v. S.*, 52 Ala. 411; *P. v. Juarez*, 28 Cal. 380; *S. v. Wellman*, 34 Minn. 221, 25 N. W. 395; *Hamilton v. S.*, 35 Miss. 214; *Warden v. S.*, 60 Miss. 638; *S. v. Ryan*, 12 Nev. 401; *S. v. Slingerland*, 19 Nev. 135; *S. v. Davis*, 38 N. J. L. 176; *S. v. Brown*, 3 Strobh. (S. C.) 508. Compare *S. v. Palmer*, 4 Penne. (Del.) 126, 53 Atl. 259. See, *contra*, *Pence v. S.*, 110 Ind. 95, 10 N. E. 919; *P. v. Woodward*, 31 Hun (N. Y.), 57. An excellent discussion of the question may be found in the dissenting opinion of Learned, P. J., in the last case.

³ *Reg. v. Bird*, 9 C. & P. 44; *Kennedy v. S.*, 31 Fla. 428, 12 So. 858; *Quinn v. P.*, 123 Ill. 333, 15 N. E. 46; *S. v. Mullen*, 30 Ia. 203; *S. v. Furlong*, 19 Me. 225; *C. v. O'Hara*, 10 Gray (Mass.), 469; *S. v. Gorham*, 55 N. H. 152; *P. v. Bennett*, 37 N. Y. 117; *S. v. Allen*, 103 N. C. 433, 9 S. E. 626; *S. v. Williams*, 2 Strobh. (S. C.) 474; *Owen v. S.*, 6 Humph. (Tenn.) 330; *U. S. v. Foye*, 1 Curtis C. C. 364, Fed. Cas. No. 15,157.

⁴ *C. v. Finn*, 108 Mass. 466; *Ward v. P.*, 3 Hill (N. Y.), 395, 6 Hill, 144, M. 663.

cates a higher degree of depravity to take property from under the protection of the person or of the building, than to take the same property when it is found not under such protection. There is, however, the violation of the security of the person and of the building, which enhances, in the estimation of the law, the gravity of the offence. But these subdivisions of the law of larceny have become so general, that a few observations will be of use.

§ 294. **Larceny from the Person**, though it can be perpetrated only by force, is nevertheless an offence requiring no other than the mere force of taking the thing stolen, and is distinguishable from robbery, in that the latter is an offence compounded of two distinct offences, — assault and larceny, — the assault being, as it were, preparatory to and in aid of the larceny.¹ If, for instance, a thief, — for instance, a pick-pocket, — in passing another person snatches a pocket-book from his hand or from his pocket, this is larceny from the person; while if the thief knocks the person down or seizes him, and then takes the pocket-book from his possession, this is robbery.² Technically, no doubt, larceny from the person involves an assault, but it is the mere force of taking the thing. In robbery, the force or fear is prior to the larceny, and preliminary to and distinct from the taking.³ And a thing is said to be on the person if it is attached, as a watch by a chain, or is otherwise so related to the person as to partake of its protection.⁴ We have already seen that the actual taking of a thing on the person in the hand, and removing it from contact or connection with the person, is a sufficient taking.⁵

§ 295. **Larceny from Building**.⁶ — Taking property in or

¹ 4 Bl. Com. 243.

² Reg. v. Walls, 2 C. & K. 214; C. v. Dimond, 3 Cush. (Mass.) 235.

³ Rex v. Harmon, 1 Hawk. P. C. (8th ed.) 214, § 7; 2 Russ. on Crimes (5th ed.), 89 et seq.

⁴ Reg. v. Selway, 8 Cox C. C. 235, C. 386. See also *post*, § 295.

⁵ *Ante*, § 277. See also Flynn v. S., 42 Tex. 301, and compare as to larceny from building, Hicks v. S., 101 Ga. 581, 28 S. E. 917.

⁶ Just what is a building within the statute often depends on the particular word employed. See Bishop Stat. Cr. (4th ed.) §§ 277 et seq.;

from a building is not necessarily larceny in a building. To constitute larceny in a building, the property taken must be in some sense under the protection of the building, and not under the eye or personal care of some one in the building.¹ Thus, if a pretended purchaser, having got manual possession of a watch in a store for the purpose of looking at it, leaves the store with the watch, he is not guilty of larceny in a building. The watch, having been delivered into his custody for a special purpose, cannot be said to be under the protection of the building. And even though it had not been so delivered, but had been merely placed on the counter for inspection, it then might be more properly said to be under the personal protection of the owner, than that of the building.² So the snatching of property hung out upon the front of a store for the purpose of attracting customers is not larceny from a building. The goods are not under the protection of the building.³ But where meat was hanging in its regular place on a hook inside a shop whence it was stolen, this was larceny from the building; and the fact that an officer was there to watch for the suspected thief made no difference.⁴ The distinctions are very fine. Thus, if a person on retiring to bed places his watch upon a table by his bedside, even within his reach, the taking of it while he is asleep is larceny from the building.⁵ The taking of it while he is awake would probably amount to simple larceny only,⁶ the property not being so related to the person as to be under his protection; while if taken from under the pillow of the owner while he is asleep, especially if the taking involved a disturbance of the

Williams v. S., 105 Ga. 814, 32 S. E. 129; *S. v. Hanlon*, 32 Or. 95, 48 P. 353. Compare *Willis v. S.*, 102 Ga. 572, 28 S. E. 917.

¹ *Rex v. Campbell*, 2 Leach (3d ed.), 942, C. 387.

² *Rex v. Owen*, 2 Leach (3d ed.), 652, M. 829; *C. v. Lester*, 129 Mass. 101; *S. v. Patterson*, 98 Mo. 283, 11 S. W. 728; *contra*, *Simmons v. S.*, 73 Ga. 609.

³ *Henry v. S.*, 39 Ala. 679; *Martinez v. S.*, 41 Tex. 126. Compare *Burge v. S.*, 62 Ga. 170.

⁴ *C. v. Nott*, 135 Mass. 269.

⁵ *Rex v. Hamilton*, 8 C. & P. 49.

⁶ *Rex v. Taylor*, R. & R. 418, C. 389; *C. v. Smith*, 111 Mass. 429.

person, it might be larceny from the person.¹ The question in all cases is whether the property is so situated that it may be taken without a violation of the protection supposed by the law to be afforded by being kept in a building, or being within the personal custody of the owner. If so, then simple larceny only is committed. If, on the other hand, the protection afforded by the building or by personal custody be violated, then the larceny is from the building or from the person, as the case may be.² The personal custody need not be actual, but may be constructive, as the cases just cited show. And perhaps a case might be supposed where the protection of the building would be constructive also.³ The old notion that in order to constitute larceny from the person the larceny must be by stealth, privily or clandestinely, and without the knowledge of the owner, which was embodied in some early statutes, is probably not now recognized by the law of any State.⁴

Since the building is not meant to be a protection against the owner of it, a larceny by the owner of the house is not larceny from the building.⁵ And for the same reason a larceny by the owner's wife is not a larceny from the building.⁶ But this is not so where the thief is simply a lodger or boarder; a larceny by him may be larceny from the building.⁷

§ 296. **Place.** — That larceny in one jurisdiction of goods

¹ *Contra*, *P. v. McElroy*, 116 Cal. 583, 48 P. 718.

² *Reg. v. Selway*, 8 Cox C. C. 235, C. 386.

³ See also *U. S. v. Jones*, 3 Wash. C. Ct. 209, Fed. Cas. No. 15,494, and *ante*, Robbery.

⁴ *Rex v. Francis*, 2 Str. 1015; *Reg. v. Walls*, 2 C. & K. 214; *Reg. v. Selway*, *ante*; *Higgs v. S.*, 113 Ala. 36, 21 So. 353; *C. v. Dimond*, 3 Cush. (Mass.) 235; 2 Bish. New Cr. Law, §§ 895 et seq.; *contra*, *Moye v. S.*, 65 Ga. 754. In Texas the taking may be either secret or so sudden that there is no opportunity for resistance: *Green v. S.*, 28 Tex. App. 493, 13 S. W. 784; *Dukes v. S.*, 22 Tex. App. 192, 2 S. W. 590.

⁵ *Rex v. Gould*, Leach C. C. (4th ed.) 217, C. 390; *C. v. Hartnett*, 3 Gray (Mass.), 450. But see *Reg. v. Bowden*, 2 Moo. C. C. 285, C. 390; so as to larceny from a vessel, *Rex v. Madox*, R. & R. 92, C. 301, M. 738.

⁶ *Rex v. Gould*, *ante*.

⁷ *Rex v. Taylor*, R. & R. 418, C. 389, M. 830; *Rex v. Hamilton*, 8 C. & P. 49.

thence transported to another jurisdiction may be larceny in the latter has already been shown.¹

§ 297. The larceny at the same time of property of different owners, though sometimes held to be separate larcenies of the property of the different owners, is but a single act; and, both upon the reason of the thing and the tendency of the modern authorities, constitutes but a single offence. The act as an offence is against the public, and not against the several owners, with reference to whom it is but a trespass. The allegation of ownership is for the purpose of identification of the property, and is but matter of pleading.²

EMBEZZLEMENT.

§ 298. **Embezzlement**, though not an offence at common law, is now so universally made such by statute as to be of general interest, subject to special statutory differences or limitations. It may be defined generally as the fraudulent appropriation of another's property by one who has the lawful possession; and is distinguished from larceny by the fact that in the latter the possession is not given but is wrongfully taken. The statutes creating the crime of embezzlement, it has been well said, "have all been devised for the purpose of punishing the fraudulent and felonious appropriation of property which had been entrusted to the person by whom it was converted to his own use in such a manner that he could not be convicted of larceny for appropriating it." If the property at the time it is taken is in the possession, actual or constructive, of the owner, it is larceny; if it is not, it is embezzlement.³

§ 299. **Possession and Custody Distinguished.**—Nice questions have arisen as to what constitutes the possession which is violated in larceny, but which in embezzlement is in the al-

¹ *Ante*, § 80.

² *Lowe v. S.*, 57 Ga. 171; *Bell v. S.*, 42 Ind. 335; *Nichols v. C.*, 78 Ky. 180; *S. v. Morphin*, 37 Mo. 373; *S. v. Merrill*, 44 N. H. 624; *S. v. Hennessey*, 23 O. St. 339; *Wilson v. S.*, 45 Tex. 76.

³ *Rex v. Bazeley*, 2 Leach C. C. (4th ed.) 835, K. 305; *C. v. Berry*, 99 Mass. 428; *C. v. Hays*, 14 Gray (Mass.), 62.

leged delinquent. Where there is no general relationship, as that of principal and agent, or employer and employee, other than that of a special and particular trust, little difficulty arises. The party trusted has the possession by delivery for a purpose, and having the right to the possession, violates the trust by fraudulently converting the property to his own use, whereby the crime of embezzlement becomes complete. Where, however, this general relationship of employer and employee exists, it often becomes a question of some difficulty to determine which party has the possession,—a difficulty which can be best illustrated by reference to a few decided cases. Thus, if a teller in a bank, to whom the funds of the bank are intrusted during business hours for the purpose of transacting the business of the bank, abstracts the funds from the vault after business hours, and after they have been withdrawn from his possession and put under the control of the cashier,¹ this is larceny, because the funds were in the possession of the bank. So if a clerk ordinarily intrusted with the sale of goods, after the store is closed, enters the store and takes away the goods.² Money taken from the till of the master by a servant is stolen, because it is taken from the possession of the master, the servant having only the custody. Money taken from a customer by the servant, and put in his own pocket before it reaches the till, is embezzled, the servant having possession for delivery to the master,—the latter, however, never having possessed it.³ The distinction is very fine, though clear, and seems to be supported by the authorities. In some States, however, the peculiarities of the statute seem to authorize an indictment for embezzlement where the possession has reached the master, and the servant holds for him,⁴ by what is elsewhere generally regarded as a mere cus-

¹ *C. v. Barry*, 116 Mass. 1.

² *C. v. Davis*, 104 Mass. 548.

³ *Rex v. Murray*, 5 C. & P. 145, 1 Moo. C. C. 276, C. 310, K. 318; *Reg. v. Watts*, 4 Cox C. C. 336, 2 Den. C. C. 14, C. 312; *Reg. v. Hawkins*, 1 Den. C. C. 584; *C. v. King*, 9 Cush. (Mass.) 284; *C. v. Berry*, 99 Mass. 428; *P. v. Hennessey*, 15 Wend. (N. Y.) 147; *U. S. v. Clew*, 4 Wash. C. Ct. 790, Fed. Cas. No. 14,819.

⁴ *Lowenthal v. S.*, 32 Ala. 589; *P. v. Hennessey*, *ante*.

tody or bare charge.¹ The theory of constructive possession was early carried to a great length, in order to make the law of larceny apply to acts which as yet no statute of embezzlement had covered. Thus, a watch placed in the hands of a watchmaker to be cleaned was held to be in the possession of the owner, so that the conversion of it was larceny in the watchmaker.²

§ 300. **Clerk. Servant. Agent. Officer.** — What constitutes the several relationships of master and servant, employer and clerk, principal and agent, and the exact meaning of the several terms, has also been the subject of much discussion. There seems to be little or no distinction, so far as the law of embezzlement is concerned, between the words “clerk” and “servant,” though in popular parlance they would hardly be confounded; but between them and the word “agent” there is a distinction made. Just where the line is drawn, however, as between the one and the other, is not very well defined. Though, in general, the idea of continuity of service underlies the relation of clerkship or service, yet this is by no means necessary; and an agency may be general and continuous as well; so that such continuity is not decisive as a criterion, though doubtless of some importance. In fact, continuity is not essential to the quality of servant or clerk.³ And it would seem that the same principle would apply here as with larceny, that if the relation, whether of master and servant or otherwise, has in fact been constituted, it is immaterial that it is temporary, if the property is obtained as a result thereof. Thus where A farmed the tolls in X and Y and regularly employed B to collect them in X, and on one occasion requested him to receive the tolls from Y from the collector for that district, an embezzlement of them by B when so received was held within the statute.⁴ Perhaps the idea of

¹ 1 Hawk P. C. (8th ed.) 144, § 6.

² Ibid., § 10.

³ Reg. v. Negus, L. R. 2 C. C. 34, K. 306; Reg. v. Spencer, R. & R. 299.

⁴ Rex v. Smith, 1 Lewin C. C. 86, M. 836; Reg. v. Hughes, 1 Moo. C. C. 370; Wynegar v. S., 157 Ind. 577, 62 N. E. 38; S. v. Costin, 89 N. C. 511; Campbell v. S., 35 O. St. 70; Goodwyn v. S. (Tex.), 64 S. W. 251.

control is more distinctly characteristic of the relationship of master and servant than of that of principal and agent.¹ Yet even here the agency may be such as to give the principal as full control of his agent as if he were a servant. An agent is always acting for his principal, with authority to bind him to the extent of his agency; while a servant, though in a certain sense acting for his master, has not the representative character of an agent, and has no authority, as servant, to bind his master. His negligence, however, may be imputed to the master. Personal presence and supervision also belong more especially to the idea of mastership.² Still it is only the circumstances of each particular case which will determine under which category a particular person comes; and no better aid in this particular can be given than by a reference to cases which involve special circumstances. Thus, although an apprentice is not technically a servant, he may, under special circumstances, be one within the meaning of the statute of embezzlement.³ But a general agent of an insurance company resident abroad is not a servant;⁴ and though a person employed to sell goods on commission and collect the purchase money is not a clerk,⁵ a commercial traveller, who does not live with his employers, or transact business at their store, may be;⁶ while one who receives material to be wrought upon in his own shop, and to be returned to the owner in the shape of manufactured goods, is neither a clerk, servant, nor agent.⁷ Neither is a constable who receives a warrant to collect, with instructions to have it served if not paid. He is rather a public officer.⁸ So the keeper of a county poorhouse stands rather in the relation of a public officer than of servant to the superintendent who appoints him.⁹

¹ *Reg. v. Bowers*, L. R. 1 C. C. 41, C. 402.

² *Rex v. Squire*, Russ. & Ry. 349.

³ *Rex v. Mellish*, Russ. & Ry. 80.

⁴ *Reg. v. May*, L. & C. 13.

⁵ *Reg. v. Bowers*, *ante*.

⁶ *Rex v. Carr*, Russ. & Ry. 198.

⁷ *C. v. Young*, 9 Gray (Mass.), 5.

⁸ *P. v. Allen*, 5 Den. (N. Y.) 76.

⁹ *Coats v. P.*, 22 N. Y. 245.

§ 301. **Agency.** — But not all agencies come within the purview of this statute.

One whose business is that of a general agent for divers persons, which from its very nature carries with it the implied permission to treat the moneys received as a general fund out of which all obligations are to be paid, such fund to be used and denominated as his own, is not held to be an agent within the meaning of the statute of embezzlement. Thus, an auctioneer, who is the agent of the buyer and the seller for effecting the sale, would find it wholly impracticable to carry on his business if he were obliged to keep separate the funds of each particular seller.¹ So a general collector of accounts is not such an agent of those for whom he collects,² nor is a general insurance agent receiving premiums for divers companies.³ Nor would a general commission merchant be; nor any person who, from the nature of his business or otherwise, has authority to confound and deposit in one account, as his own, funds received from divers sources.⁴ But if the defendant, although having a general authority to confound, holds money under a special contract forbidding this he would be liable.⁵ But in general, wherever it was the intention of the parties to create only a relation of debtor and creditor, it is clear that a failure to pay the amount due can not be embezzlement.⁶

The word "officer," as used in statutes of embezzlement, has been held to apply to the sheriff of a county,⁷ the treasurer

¹ *C. v. Stearns*, 2 Met. (Mass.) 343.

² *C. v. Libbey*, 11 Met. (Mass.) 64; *accord*, *Reg. v. Hoare*, 1 F. & F. 647. Compare *S. v. Thomson*, 155 Mo. 300, 55 S. W. 1013.

³ *P. v. Howe*, 2 T. & C. (N. Y.) 383.

⁴ *C. v. Foster*, 107 Mass. 221; *Mulford v. P.*, 139 Ill. 586, 28 N. E. 1096; *P. v. Wadsworth*, 63 Mich. 500, 30 N. W. 99. Otherwise, by statute in Illinois, as to commission merchants, warehousemen, etc., *Wright v. P.*, 61 Ill. 382.

⁵ *C. v. Foster*, *ante*; *S. v. Cunningham*, 154 Mo. 161, 55 S. W. 282. Compare *C. v. Smith*, 129 Mass. 104.

⁶ See, in addition to cases *ante*, *S. v. Brown*, 171 Mo. 477, 71 S. W. 1031; *S. v. Barton*, 125 N. C. 702, 34 S. E. 553.

⁷ *S. v. Brooks*, 42 Tex. 62.

of a town,¹ of a county,² of a State,³ a selectman,⁴ a justice of the peace,⁵ the directors of a bank,⁶ and the treasurers of railroads and other bodies politic.⁷ And it is immaterial whether the corporation is *de jure*, or simply *de facto*.⁸ So it is enough if the defendant is a *de facto* officer.⁹ Perhaps "servant" would aptly describe such persons, if the word "officer" was not in the statute.¹⁰

§ 302. **Employment.** — Embezzlement, as we have seen, is substantially a breach of trust; and is the peculiar crime of those who are employed or trusted by others. Hence, if there is no employment of A by B there can be no embezzlement by A of money or property which he may have acquired even though with a duty to deliver it to B. Thus, where it was A's business to carry gloves from X to Y, receive the money for them and deliver it to the glove makers at X, he was held to be a carrier and his duty to the glove makers to arise from that fact, not from any peculiar relation of confidence or trust between themselves and him; consequently, a felonious conversion by him of money thus received was not embezzlement.¹¹ So where a bankrupt made an assign-

¹ *C. v. Este*, 140 Mass. 279, 2 N. E. 769; *Bork v. P.*, 91 N. Y. 5.

² *S. v. King*, 81 Ia. 587, 47 N. W. 775; *S. v. Smith*, 13 Kan. 274; *S. v. Czizek*, 38 Minn. 192, 36 N. W. 457.

³ *S. v. Archer*, 73 Md. 44, 20 Atl. 172; *P. v. McKinney*, 10 Mich. 51; *Hemingway v. S.*, 68 Miss. 371, 8 So. 317. See also *S. v. Parsons*, 54 Ia. 405, 6 N. W. 579; *S. v. Walton*, 62 Me. 106; *S. v. White*, 66 Wis. 343, 28 N. W. 202.

⁴ *S. v. Boody*, 53 N. H. 610.

⁵ *Crump v. S.*, 23 Tex. App. 615, 5 S. W. 182.

⁶ *C. v. Wyman*, 8 Met. (Mass.) 247.

⁷ *Reeves v. S.*, 95 Ala. 31, 11 So. 158; *C. v. Tuckerman*, 10 Gray (Mass.), 173.

⁸ *Kossakowski v. S.*, 177 Ill. 563, 53 N. E. 115; *P. v. Hawkins*, 106 Mich. 479, 64 N. W. 736; *P. v. Carter*, 122 Mich. 668, 81 N. W. 924; *S. v. Reynolds*, 65 N. J. L. 424, 47 Atl. 644.

⁹ *S. v. Findley*, 101 Mo. 217, 14 S. W. 185.

¹⁰ *Rex v. Squire*, Russ. & Ry. 349; *Reg. v. Welch*, 2 C. & K. 296. The term "officer" does not include clerks, *S. v. Denton*, 74 Md. 517, 22 Atl. 305; *U. S. v. Smith*, 124 U. S. 525.

¹¹ *Reg. v. Gibbs*, 6 Cox C. C. 455. See also *Colip v. S.*, 153 Ind. 584,

ment of his property, a conversion by him of debts which he collected was no embezzlement; since the legal title to them was still in him and he neither received the money nor owed the duty of paying it to the assignees because of any employment.¹ So where the teller of a bank misread a draft and intentionally paid \$200 where only \$100 was called for, the felonious retention of the balance by the payee was not embezzlement, since it had not come to him through any trust reposed in him by the teller.² Many of the statutes limit the crime to cases where the fraudulent commission is by one who gets possession of the money or property "by virtue of his employment." Under this limitation it has been held, by a very strict construction, that if a servant employed to sell goods at a fixed price sells them at a less price, and embezzles the money, — that money not being the master's, but the purchaser still remaining bound for the full fixed price, — the servant does not come in possession of his master's money by virtue of his employment.³ So, when a servant receives money for the use of his master's property, but in a manner contrary to his right or authority, and in violation of his duty, it is said not to be his master's money, but rather his own.⁴ But this strictness of interpretation has not been followed in this country, where it has been held that, if an agent obtains money in a manner not authorized, and in violation of his duty, yet under the guise of his agency, he gets it by virtue of his employment;⁵ thus, where an agent for the sale of land fraudulently had notes made payable to himself he was guilty of embezzlement of the funds so ob-

55 N. E. 739; *Reed v. S.*, 16 Tex. App. 586. In many States bailees are included within the embezzlement statutes.

¹ *Reg. v. Barnes*, 8 Cox C. C. 129, C. 394.

² *C. v. Hays*, 14 Gray (Mass.), 62, C. 407.

³ *Reg. v. Aston*, 2 C. & K. 413, M. 838; *Rex v. Snowley*, 4 C. & P. 390, M. 837.

⁴ *Reg. v. Harris*, 6 Cox C. C. 363, C. 397; *Reg. v. Cullum*, L. R. 2 C. C. 28, C. 398, K. 311, M. 839; *Reg. v. Read*, L. R. 3 Q. B. D. 131; *Brady v. S.*, 21 Tex. App. 659, 1 S. W. 462; *Loving v. S.*, 44 Tex. Cr. R. 373, 71 S. W. 277.

⁵ *Ex parte Hedley*, 31 Cal 108.

tained;¹ so where a clerk after being discharged, received moneys paid in the belief that he was still clerk, they were held to be obtained by him in the course of his employment.² Later English cases seem now in accord with this view.³

§ 303. **Subject Matter of Embezzlement.** — It is generally provided that all matters which may be subjects of larceny may also be subjects of embezzlement. Some statutes, however, are not so comprehensive. Save these differences, which cannot here be particularized, it may be said that whatever may be stolen may be embezzled; and what may be stolen has been considered under the title Larceny. And as is also the case in larceny, it is not necessary that the person from whom the property is embezzled should have a title good against all the world. It is enough that as between him and the defendant the latter owes the duty of delivering as stated above.⁴

§ 304. **Intent to Defraud** is an essential element of the case. And if the money is taken under a claim of right, as where a cashier of a mercantile establishment intercepts funds of his employers, and without their knowledge and against their wish appropriates them to the payment of his salary, by charging them to his account, this is no embezzlement.⁵ So if the use of money was made in good faith, with no intention of depriving the owner of it, the mere inability to return the money does not make the act embezzlement.⁶ But the mere

¹ *S. v. Rue*, 72 Minn. 296, 75 N. W. 235; *S. v. Schlib*, 159 Mo. 130, 60 S. W. 82.

² *S. v. Jennings*, 98 Mo. 493, 11 S. W. 980. See also *S. v. Patterson*, 66 Kan. 447, 71 P. 860; *P. v. Butts*, 128 Mich. 208, 87 N. W. 224.

³ *Reg. v. Beechey*, Russ. & Ry. 319; *Rex v. Salisbury*, 5 C. & P. 155; *Reg. v. Wilson*, 9 C. & P. 27, K. 313.

⁴ *Rex v. Beacall*, 1 C. & P. 454; *Reg. v. Stainer*, L. R. 1 C. C. 230; *S. v. Sienkiewicz*, 4 Penne. (Del.) 59, 55 Atl. 346; *S. v. Tunney*, 81 Ind. 559; *S. v. Cunningham*, 154 Mo. 161, 55 S. W. 282; *S. v. Hoshor*, 26 Wash. 643, 67 P. 386.

⁵ *Ross v. Innis*, 35 Ill. 487; *Kirby v. Foster*, 17 R. I. 437, 22 Atl. 1111.

⁶ *Henderson v. S.*, 129 Ala. 104, 29 So. 799; *S. v. O'Kean*, 35 La. Ann. 901; *P. v. Hurst*, 62 Mich. 276, 28 N. W. 838; *P. v. Wadsworth*, 63 Mich. 509, 30 N. W. 99; *S. v. Cowdery*, 79 Minn. 94, 81 N. W. 750; *Myers v. S.*, 4 O. Circ. Ct. 570.

hope or intention of making good the loss at some future day will not prevent the crime from being embezzlement.¹

FALSE PRETENCES.

§ 305. Mere verbal lying, whereby one is defrauded of his property without the aid of some visible token, device, or practice,—as when one falsely pretends that he has been sent for money,² or falsely states that goods sold exceed the amount actually delivered,³ or falsely asserts his ability to pay for goods he is about to buy,⁴—was not formerly an indictable offence. But as many frauds were practised in this way which were mere private frauds, and which the court, with every disposition to punish, could not stretch the law of larceny to cover, it was at length enacted⁵ that designedly obtaining money, goods, wares, or merchandise by false pretences, with intent to defraud any person, should be indictable. The provisions of this statute have been so generally adopted in this country, that, if it cannot be said to be strictly part of the common law, it may be considered as the general law of the land. And though the terms in which the enactment is made may slightly differ in the different States, yet they are so generally similar that in most cases the decisions in one State will serve to illustrate and explain the statutes in others. And as the words of the statute cover cheats as well by words as by acts and devices, indictments under the statute are now usually resorted to, unless special circumstances or special provisions compel a resort to the old form of pleading. Under the statutes, in order to constitute the offence, it must appear (1) that the pretence is false; (2) that there was an intent to defraud; (3) that an actual fraud was committed; (4) that the false pretences were made for the purpose of perpe-

¹ *P. v. Jackson*, 138 Cal. 462, 71 P. 566; *P. v. Warren*, 122 Mich. 504, 81 N. W. 360; *P. v. Butts*, 128 Mich. 208, 87 N. W. 224.

² *Reg. v. Jones*, 1 Salk. 379.

³ *Rex v. Osborn*, 3 Burr. 1697.

⁴ *C. v. Warren*, 6 Mass. 72.

⁵ 30 Geo. II, c. 24.

trating the fraud; (5) and that the fraud was accomplished by means of the false pretences.¹

§ 306. (1.) **Pretence Must Be False.** — A false pretence is a false statement about some past or existing fact, in contradistinction from a promise, an opinion, or a statement about an event that is to take place. Thus, a pretence that one has a warrant to arrest, if false, is within the statute,² while a pretence that his goods “are about to be attached” is not.³ Nor is a statement that something could, would, or should be done;⁴ thus a representation that a person will not be able to meet a note when it becomes due is not a pretence within the statute.⁵

The shades of distinction are sometimes very nice. Thus “I can give you employment” is no pretence;⁶ but “I have a situation for you in view” is.⁷ And it seems that the false statement of an existing desire or intention to accomplish some present purpose, may be a false pretence.⁸ Thus, a promise may be considered as a statement of an intention to carry out the promise; and if there was no such intention, it is a false pretence.⁹ But on the other hand, in many cases the promise has apparently been considered by the courts to be, not so much a statement of the present frame of mind on the part of the promisor as a declaration as to his action in the future. For this reason it is generally said that a promise, since it looks primarily to future action, cannot be a sufficient false pretence. Thus, where the defendant got money on the strength of a statement that he was going to pay his rent,¹⁰ or

¹ *C. v. Drew*, 19 Pick. (Mass.) 179.

² *C. v. Henry*, 22 Pa. 253.

³ *Burrow v. S.*, 12 Ark. 65.

⁴ *Ryan v. S.*, 45 Ga. 128; *S. v. Magee*, 11 Ind. 154; *S. v. Evers*, 49 Mo. 542; *Johnson v. S.*, 41 Tex. 65.

⁵ *C. v. Moore*, 99 Pa. 570.

⁶ *Ranney v. P.*, 22 N. Y. 413.

⁷ *C. v. Parker*, Thatcher Cr. Cas. (Mass.) 24.

⁸ *S. v. Rowley*, 12 Conn. 101; *S. v. Sarony*, 95 Mo. 349, 8 S. W. 407; *C. v. Walker*, 108 Mass. 309.

⁹ *Reg. v. Jones*, 6 Cox C. C. 467; *S. v. Dowe*, 27 Ia. 273.

¹⁰ *Reg. v. Lee*, L. & C. 309, K. 323, M. 851.

that he would marry the prosecutrix,¹ or that he was going to erect a soap factory near the prosecutor's residence,² or was going to buy cattle with the money advanced him,³ it was held that the statements were not false pretences within the meaning of the criminal law.⁴

The same distinction exists as to opinions. Mere opinions as to quality, value, quantity, amount, and the like, are held not to be false pretences.⁵ The fact, however, that one does or does not hold an opinion is as much an existing fact as any other; and if it is falsely stated with intent to defraud, and does defraud, it is in every particular within both the letter and spirit of the law.⁶ It may be difficult to prove that an opinion is known by the person who asserts it to be false, and that it was falsely asserted with intent to defraud. But this is a question of procedure.

The belief by the party making the statement that it is false is of no moment, if it is in fact true.⁷ Thus where A mortgaged land to B, and then in the presence of B mortgaged it to C with the statement that there was no mortgage on the land ahead of C's, B by acquiescing in the statement was held to have waived his priority; consequently A's statement was in fact true, and no false pretence.⁸ On the contrary, if the statement be false, yet he believes it to be true, this is not within the statute, as in such case there is no intent to defraud.

¹ *Reg. v. Johnston*, 2 Moo. C. C. 254.

² *P. v. Wheeler*, 169 N. Y. 487, 62 N. E. 572.

³ *Cook v. S.* (Neb.), 98 N. W. 810.

⁴ See further *Rex v. Douglas*, 1 Moo. C. C. 462; *Rex v. Goodhall*, R. & R. 461; *Reg. v. Gordon*, L. R. 23 Q. B. D. 354, K. 326; *Calhoun v. S.*, 119 Ga. 312, 46 S. E. 428; *S. v. Colly*, 39 La. Ann. 841, 2 So. 496; *S. v. DeLay*, 93 Mo. 93, 5 S. W. 607; *P. v. Blanchard*, 70 N. Y. 314; *P. v. Rothstein*, 95 App. Div. (N. Y.) 292, 88 N. Y. S. 622.

⁵ *Reg. v. Williamson*, 11 Cox C. C. 328; *Reg. v. Oates*, 6 Cox C. C. 540; *Reg. v. Bryan*, 7 Cox C. C. 312; *Reg. v. Goss*, 8 Cox C. C. 262; *Reese v. Wyman*, 9 Ga. 430; *S. v. Estes*, 46 Me. 150; *Scott v. P.*, 62 Barb. (N. Y.) 62.

⁶ *Reg. v. Ardley*, L. R. 1 C. C. 301; *S. v. Tomlin*, 5 Dutch. (N. J.) 13.

⁷ *Rex v. Spencer*, 3 C. & P. 420, M. 850.

⁸ *S. v. Asher*, 50 Ark. 427, 8 S. W. 177.

The pretence must be false at the time when the property is obtained. If it be false when made, but becomes true at the time when the property is obtained, — as where one states that he has bought cattle, when in fact he had not at the time of the statement, but had when he obtained the money, — there is no offence.¹ *Vice versa*, however, if the statement be true when made, but becomes false at the time of obtaining the property, — as if, in the case supposed, the cattle had been bought, but had been sold at the time when the property was obtained, — then the offence would no doubt be committed.

§ 307. **Subject Matter.** — Any lie about any subject matter, by word or deed, — as by showing a badge, or wearing a uniform, or presenting a check or sample or trade-mark, or by a look or a gesture, — subject to the foregoing limitations, is a false pretence. Thus, if one falsely assert as an existing fact that he possesses supernatural power,² or that he has made a bet,³ or that he is pecuniarily responsible⁴ or irresponsible,⁵ or is a certain person,⁶ or that he is agent for or represents a certain person,⁷ or belongs to a certain community⁸ or military organization,⁹ or is married,¹⁰ or unmarried,¹¹ or engaged in a certain business,¹² or that a horse which he offers to sell is sound,¹³ or that a flock of sheep is free from disease,¹⁴ or any other lie about any matter where money is fraudulently obtained, — the offence

¹ *In re Snyder*, 17 Kan. 542; *P. v. Wheeler*, 169 N. Y. 487, 62 N. E. 572.

² *Reg. v. Giles*, 10 Cox C. C. 44; *Reg. v. Bunce*, 1 F. & F. 523.

³ *Young v. Rex*, 3 T. R. 98.

⁴ *S. v. Pryor*, 30 Ind. 350.

⁵ *S. v. Tomlin*, 5 Dutch. (N. J.) 13.

⁶ *C. v. Wilgus*, 4 Pick. (Mass.) 177; *P. v. Cook*, 41 Hun (N. Y.), 167.

⁷ *P. v. Johnson*, 12 Johns. (N. Y.) 292.

⁸ *Rex v. Barnard*, 7 C. & P. 734.

⁹ *Hamilton v. Reg.*, 9 Q. B. 271; *Thomas v. P.*, 34 N. Y. 351.

¹⁰ *Reg. v. Davis*, 11 Cox C. C. 181.

¹¹ *Reg. v. Copeland*, C. & M. 516; *Reg. v. Jennison*, 9 Cox C. C. 158, L. & C. 157, K. 324.

¹² *P. v. Dalton*, 2 Wheeler Cr. Cas. (N. Y.) 161.

¹³ *S. v. Stanley*, 64 Me. 157.

¹⁴ *P. v. Crissie*, 4 Den. (N. Y.) 525.

is complete. "Why should we not hold that a mere lie about any existing fact, told for a fraudulent purpose, should be a false pretence?"¹

§ 308. "Puffing." — The ordinary "puffing" of the quality of an article, such as is to be expected in the course of trade, though perhaps immoral, is not criminal; because it is a mere expression of opinion such as the purchaser should expect and be on the lookout against. Thus, a statement that certain plated spoons were equal to "Elkinton's A" (a particular sort of plated goods), and had as much silver as those goods, was held not to be a criminal false pretence;² an extreme case, however, and one with which dissatisfaction has been expressed.³ But the principle was clearly correctly applied in cases where it was held that statements that land was "nicely located,"⁴ or "well wooded and with valuable timber,"⁵ were mere business puffing.

This principle, however, will not excuse a positive statement as to a fact, made falsely; as, for instance, a statement that certain goods are silver, when in fact they are of base metal.⁶ Nor will it excuse a false representation of soundness upon the sale of a horse.⁷ So where a dealer sold as "good tea" a mixture of other substances, containing only a small proportion of tea, this was held to be a false pretence;⁸ so where bonds were sold under a false statement as to their market value.⁹ "A statement may be a mere commendation or expression of opinion, by which the seller seeks to enhance the price of the property, and justifiable; but when it is made and intended as an assertion of a fact material to the negotia-

¹ Alderson. B., Reg. v. Woolley, 1 Den. C. C. 559.

² Reg. v. Bryan, 7 Cox C. C. 312, Dears. & B. 265, M. 855.

³ Erle. C. J., in Reg. v. Goss, 8 Cox C. C. 262.

⁴ P. v. Jacobs, 35 Mich. 36.

⁵ S. v. Paul, 69 Me. 215. See also P. v. Morphy, 100 Cal. 84, 34 P. 623; S. v. Young, 76 N. C. 258.

⁶ Reg. v. Roebuck, 7 Cox C. C. 126; Reg. v. Ardley, L. R. 1 C. C. 301, M. 864.

⁷ S. v. Stanley, 64 Me. 157; Jackson v. P., 126 Ill. 139, 18 N. E. 286.

⁸ Reg. v. Foster, L. R. 2 Q. B. D. 301.

⁹ P. v. Jordan, 66 Cal. 10, 4 P. 773.

tion, as a basis on which the sale is to be made, if it be false, and is known to the seller to be so, the seller is guilty of the offence, if he thereby induces the buyer to part with his property.”¹

§ 309. **Implied Representations.** — There may be an obtaining by false pretences, though all defendant's statements were true, if a falsehood was implied. Thus where one sold certain goods to another, having previously given a bill of sale of them to a third party, this was an obtaining by false pretences.²

The pretence need not be in words ; the falsity may consist entirely in acts. Thus where the defendant, not being a member of the University, went to purchase goods in Oxford wearing a sort of cap worn only by the students of a certain College, it was held to be an obtaining by false pretences.³ So where a coal miner, who was paid according to the number of tubs of coal he mined, put two tickets instead of one into a tub, and thus secured double pay, it was held an obtaining by false pretences.⁴

The giving of a check by a person who has no bank account is a false pretence.⁵ But if he has an account, and a reasonable belief that the check will be good when presented, it is not a false pretence, though at the time the check is drawn there is no money in the bank to meet it.⁶

§ 310. (2.) **Intent to Defraud.** — If the money be obtained by the false pretence, the intent being to obtain it thereby, as where one obtains a loan upon a forged certificate of stock in a railroad company, the offence is complete, though the party

¹ *Jackson v. P.*, 126 Ill. 139, 149, 18 N. E. 286.

² *Reg. v. Sampson*, 52 L. T. 772. See also *Reg. v. Randell*, 16 Cox C. C. 335.

³ *Rex v. Barnard*, 7 C. & P. 784, K. 333; see also *Reg. v. Bull*, 13 Cox C. C. 608.

⁴ *Reg. v. Hunter*, 10 Cox C. C. 642. See also *Reg. v. Murphy*, Irish Rep. 10 C. L. 508, K. 338, M. 852; *Reg. v. Cooper*, L. R. 2 Q. B. D. 510, K. 333.

⁵ *Rex v. Parker*, 7 C. & P. 825; *P. v. Wasservogle*, 77 Cal. 173, 19 P. 270; *Barton v. P.*, 135 Ill. 405, 25 N. E. 776.

⁶ *Reg. v. Walne*, 11 Cox C. C. 647; *C. v. Drew*, 19 Pick. (Mass.) 179.

obtaining the money fully intended and believed he should be able to pay the note at maturity and redeem the stock.¹ But where the representation is made, not to get property at all, but for some other purpose, the crime is not committed.² If the object in getting possession of the property be not to defraud, but to compel payment of a debt, — as when a servant gets possession of the goods of his master's debtor, to enable his master to collect his debt, — the offence is not committed.³ So if the object be merely to get one's own property from the possession of another.⁴

But where the defendant having an unliquidated claim against a railroad for injuries, by false representations induced the company to pay a large sum, the fact that he might, in the opinion of the jury, have recovered that amount in an action against the railroad was held no defence.⁵

§ 311. (3 and 4.) **Actual Perpetration of the Fraud.** — If the fraud be not actually accomplished by obtaining the goods, money, etc., as the charge may be, it is but an attempt, and only indictable as such. And if a person is merely induced by the false pretence to pay a debt which he previously owed, or to indorse a note which he had agreed to indorse, it is no offence under the statute.⁶ So it has been held in New York,⁷ that parting with money for charitable purposes is not within the statute. But this case rests upon the supposed restraining force of the preamble of the statute; and elsewhere the law has been held to be the reverse.⁸ So obtaining a promissory

¹ *Reg. v. Naylor*, 10 Cox C. C. 149, M. 880; *C. v. Schwartz*, 92 Ky. 510, 18 S. W. 358; *C. v. Coe*, 115 Mass. 481; *S. v. Thatcher*, 35 N. J. L. 445.

² *Rex v. Wakeling*, R. & R. 504; *Reg. v. Stone*, 1 F. & F. 311, M. 880; *Hunter v. S.* (Tex.), 81 S. W. 730.

³ *Rex v. Williams*, 7 C. & P. 354, M. 879; *C. v. McDuffy*, 126 Mass. 467; *S. v. Hurst*, 11 W. Va. 54; *post*, § 311.

⁴ *In re Cameron*, 44 Kan. 64, 24 P. 90.

⁵ *C. v. Burton*, 183 Mass. 461, 67 N. E. 419.

⁶ *P. v. Getchell*, 6 Mich. 496; *P. v. Thomas*, 3 Hill (N. Y.), 169; *ante*, § 310.

⁷ *P. v. Clough*, 17 Wend. 351.

⁸ *Reg. v. Jones*, 1 Den. C. C. 551; *Reg. v. Hensler*, 11 Cox C. C. 570;

note from a minor has been held to be no actual fraud, as the minor is not bound to pay;¹ though it may well be doubted if the paper upon which the note is written is not "goods," within the meaning of the statute.² So where the defendant sells by false pretences a promissory note which in fact is perfectly good, the crime is not committed.³

From the rule that the false pretence must be the inducement for parting with the property, it follows that after possession and property, — though under a voidable title, — is obtained, a false representation, whereby the owner is induced to permit the property to be retained, does not amount to the offence; as where a vendor, suspecting the solvency of the vendee, proposes to retake his goods, but is induced by false pretences to abandon his purpose; though it might be otherwise if the right to the property had not passed.⁴

§ 312. **Fraud in Both Parties.** — When in a transaction each party makes false pretences, and each defrauds the other, — as when two parties exchange watches, each falsely pretending that his watch is gold of a certain fineness, — each is indictable, and neither can defend on the ground of the other's deceit.⁵ It is held in New York, however, that if the money parted with is for the purpose of inducing the false pretender to violate the law, as, for instance, a pretended officer not to serve a warrant, the indictment will not lie.⁶ But this case proceeds upon the ground that the object of the statute is to protect the honest, while the better view is that the law is for the protection of all, by the punishment of rogues. The application of the principle that one man may escape punishment for crime because the person upon whom he committed it was

C. v. Whitcomb, 107 Mass. 486. So in New York now by statute, 1851, c. 144, § 1.

¹ *C. v. Lancaster, Thatch. Cr. Cas. (Mass.)* 428.

² *Reg. v. Danger*, 7 Cox C. C. 303.

³ *P. v. Wakely*, 62 Mich. 297, 28 N. W. 871.

⁴ *P. v. Haynes*, 14 Wend. (N. Y.) 546.

⁵ *C. v. Morrill*, 8 Cush. (Mass.) 571.

⁶ *McCord v. P.*, 46 N. Y. 470, C. 148, Peckham, J., dissenting, with whom is the weight both of reason and authority; *C. v. Henry*, 22 Pa. 253; 2 Bish. Cr. Law, § 469. See *ante*, § 25.

guilty of the same or a different crime, would paralyze the law. The true rule is to punish each for the crime he commits.

§ 313. **Delivery with Knowledge. Ordinary Prudence.**— If the party who delivers the goods is not deceived by the false pretence, but is aware of its falsity, the offence is not committed, though there would be an attempt;¹ and so, perhaps, if he has the means of knowledge, — as when one falsely represented that on a former occasion he did not receive the right change, and thereby obtained additional change.² Yet if the change thus obtained is through actual deceit, operating on the mind of the party who delivers, it is within both the letter and the spirit of the law,³ and for this reason and those mentioned in the next paragraph the doctrine of the last-mentioned case would seem unsound.⁴

The false pretence, it was once generally and is now sometimes said, must be of such a character as is calculated to deceive a man of ordinary intelligence and caution.⁵ One man, it has been intimated by high authority, is not to be indicted because another man has been a fool.⁶ But in the practical application of the rule the courts seem to have been guided, in determining whether the false pretence was an indictable one, more by the fact that the deceit and fraud were intended and actually accomplished, than that they were calculated generally to deceive. And the doctrine which formerly obtained, that if the party from whom the goods were obtained is negligent, or fails in ordinary prudence, the offence is not committed, seems now to be generally discarded, as a doctrine which puts the weak-minded and the incautious at the mercy of rogues. The tendency of the more recent

¹ *Reg. v. Mills*, D. & B. C. C. 205; *Reg. v. Hensler*, 11 Cox C. C. 570; *S. v. Young*, 76 N. C. 258.

² *C. v. Drew*, 19 Pick. (Mass.) 179; *C. v. Norton*, 11 All. (Mass.) 266.

³ *Reg. v. Jessop*, D. & B. C. C. 442; 2 Bish. Cr. Law, § 432a.

⁴ *C. v. Mulrey*, 170 Mass. 103, 49 N. E. 91.

⁵ *S. v. Hood*, 3 Penne. (Del.) 418, 53 Atl. 437; *Jones v. S.*, 50 Ind. 473; *C. v. Grady*, 13 Bush. (Ky.) 285; *S. v. Lawrence*, 178 Mo. 350, 77 S. W. 497; *S. v. De Hart*, 6 Baxt. (Tenn.) 222.

⁶ Per Lord Holt, *Reg. v. Jones*, 2 Ld. Raym. 1013, M. 845.

authorities is to establish the rule that, whatever the pretence, if it be intended to defraud, and actually does defraud, the offence is committed. The shallowness of the pretence, and its obvious falsity, may be evidence that the party must have had knowledge, and so was not deceived or defrauded by the pretence; but it is only evidence upon the question whether in fact the person parting with his property was deceived. If, in fact, the party is induced by the pretence to part with his money,—if the pretence takes effect,—then the money is obtained by it. Thus, it was held that a pretence that a one-pound note, reading so upon its face, was a five-pound note, to a party who could read, was a false pretence.¹ It was also held an indictable false pretence to represent to a person who could not read, as a Bank of England note the following instrument :

“ £5.] BANK OF ELEGANCE. [No. 230.

“I promise to pay on demand the sum of five Rounds, if I do not sell articles cheaper than anybody in the whole universe.

“Five.

For MYSELF & Co.

“Jan. 1. 1850.

M. CARROLL.”²

So where the defendant obtained money on the pretence that he could communicate with spirits, it was held an obtaining by false pretences.³ So where the misrepresentation is in regard to the title to land, the fact that the person deceived could have protected himself by consulting the records is no defence.⁴

¹ *Reg. v. Jessop*, D. & B. C. C. 442.

² *Reg. v. Coulson*, 1 Den. C. C. 592. See also *Reg. v. Woolley*, 1 Den. C. C. 559; *Elmore v. S.*, 138 Ala. 50, 35 So. 25; *Cowen v. P.*, 14 Ill. 348; *Lefler v. S.*, 153 Ind. 82, 54 N. E. 439; *S. v. Mills*, 17 Me. 211; *P. v. Bird*, 126 Mich. 631, 86 N. W. 127, M 869; *Oxx v. S.*, 59 N. J. L. 99, 35 Atl. 646; *P. v. Cole*, 65 Hun (N. Y.), 624, 20 N. Y. S. 505; *Colbert v. S.*, 1 Tex. App. 314; *Harrison v. S.*, 44 Tex. Cr. R. 243, 70 S. W. 421; *In re Greenough*, 31 Vt. 279; 2 Bish. Cr. Law, § 464; Steph. Dig. Cr. Law, art. 330; Roscoe's Cr. Ev. (9th ed.) 498.

³ *Reg. v. Lawrence*, 36 L. T. Rep. 404.

⁴ *Crawford v. S.*, 117 Ga. 247, 43 S. E. 762; *Keyes v. P.*, 197 Ill. 638, 64 N. E. 730.

§ 314. (5.) **The Fraudulent Pretence as the Means.**—The false pretence must have been the means whereby the defrauded party was induced to part with his property.¹ It is not meant by this that the false pretence should have been the sole inducement which moved the promoter. It is enough if, co-operating with other inducements, the fraud would not have been accomplished but for the false pretence.² Thus where the defendant falsely represented that he had an order for six thousand cloaks, that he could pay for the cloth, and would give an order on the person ordering them, the fact that by statute no representation as to solvency was binding unless in writing, and that the statement as to giving the order was purely promissory, did not invalidate the conviction when it appeared that the prosecutor, though relying on both these, also relied on the representation that the defendant had this large order.³ So when property is sold with a written covenant of title and against encumbrances, and at the same time it is also fraudulently represented verbally that the property is unencumbered, the offence is committed if the verbal representation was the inducement.⁴ It is doubtful, however, whether a written covenant of title, or against encumbrances merely, can be fairly regarded as a representation that the property sold is unencumbered, so as to be the foundation of an indictment. It would seem to be only an agreement which binds the party civilly in case of breach.⁵

§ 315. **Remoteness of the Pretence.**—The pretence must be reasonably near to the obtaining; if too remote, the crime is not committed.

It is clear that where, as a step toward getting the money, the defendant enters into a contract with the prosecutor or

¹ *Reg. v. Mills*, D. & B. 205, K. 340.

² *Reg. v. Lince*, 12 Cox C. C. 451; *In re Snyder*, 17 Kan. 542; *S. v. Thatcher*, 35 N. J. L. 445; *P. v. Haynes*, 11 Wend. (N. Y.) 557; *Fay v. C.*, 28 Grat. (Va.) 912.

³ *P. v. Rothstein*, 95 App. Div. (N. Y.) 292, 88 N. Y. S. 622. See also *S. v. Fooks*, 65 Ia. 196, 21 N. W. 561.

⁴ *Reg. v. Abbott*, 1 Den. C. C. 273; *S. v. Dorr*, 33 Me. 498; *C. v. Lincoln*, 11 All. (Mass.) 233.

⁵ *Rex v. Codrington*, 1 C. & P. 661; *S. v. Chunn*, 19 Mo. 233.

sells an article to him and he pays on the sale, it is none the less an obtaining by false pretences. The sale of a cheese by false "tasters,"¹ or of a horse by false representations as to his soundness,² is an illustration of this class of case. So where the defendant induced the prosecutor by false pretences to agree to build him a wagon, his purpose being from the outset to get the wagon by this means, the court held that the pretence was a continuing one, not too remote and that he might rightfully be convicted.³ On the other hand, where the defendant by false representations secured a contract for board and lodging, and afterward borrowed sixpence of his landlord, there being no new representation, and no evidence that he had this scheme in mind when he contracted, it was held that the loan was induced, not by the original misrepresentations, but by the fact that he was a lodger;⁴ although it was said in a later case⁵ that the question whether the prosecutor was not in fact partially influenced by the original misrepresentations should have been left to the jury. It was at one time held in England that where the defendant obtained admission to a swimming-race by a false representation, and won the prize, the prize was not obtained by false pretences.⁶ This case has since been overruled, the court proceeding on the ground that as the pretences were made for the very purposes of bringing about the result actually achieved, and the intervening chain of events was just that intended by the defendant and naturally following from his act, they could not be held too remote to be a partial effective cause in obtaining the property.⁷ In this country, where, to induce one to buy certain shares in the stock of a corporation, the defendant falsely stated that their

¹ *Reg. v. Abbott*, 1 Den. C. C. 273.

² *Reg. v. Kenrick*, 5 Q. B. 49. See also *S. v. Newell*, 1 Mo. 248; *C. v. Hooper*, 104 Mass. 549.

³ *Reg. v. Martin*, L. R. 1 C. C. R. 56, K. 344. See also *Reg. v. Greathead*, 14 Cox C. C. 108.

⁴ *Reg. v. Bryan*, 2 F. & F. 567. See also *Reg. v. Gardner, D. & B.* 41, M. 870.

⁵ *Reg. v. Martin*, *ante*.

⁶ *Reg. v. Larner*, 14 Cox C. C. 497.

⁷ *Reg. v. Button* [1900] 2 Q. B. D. 597, K. 342, M. 873.

purchase was necessary in order to participate in the drawing of certain lots, the falsehood was held too remote.¹ So where the defendant by false representations induced a city to agree that judgment should be entered against it, and the judgment was paid, it was held by the majority of the court not to be an obtaining by false pretences,² the dissenting minority adopting the view taken in the English cases above mentioned, that the test was the "direct connection between the pretence and the payment of the money."³

§ 316. **Property Obtained.**—In general, the property obtained must be such as is the subject of larceny.⁴ The obtaining a credit on account,⁵ for instance, is not within the statute, unless its scope is sufficient to embrace such a transaction; nor is the procurement of an indorsement of payment of a sum of money on the back of a promissory note,⁶ nor obtaining land,⁷ or board and lodging.⁸ The statutes of the several States must control in this particular.

§ 317. **False Pretences. Larceny.**⁹—The distinction between the crimes of obtaining money by false pretences and larceny is fine but clear. If a person by fraud induces another to part with the possession only of goods, this is larceny; while to constitute the former offence the property as well as the possession must be parted with.¹⁰ In larceny the owner has no intention to part with his property, and the thief cannot give a good title. If the owner delivers his property under the inducement of a false pretence, with intent to part with his

¹ *C. v. Springer*, 8 Pa. Co. Ct. 115.

² *C. v. Harkins*, 128 Mass. 79.

³ See also *Musgrave v. S.*, 133 Ind. 297, 32 N. E. 885; *C. v. Mulrey*, 170 Mass. 103, 49 N. E. 91. Compare *Hunter v. S. (Tex.)*, 81 S. W. 730.

⁴ *Reg. v. Robinson*, Bell C. C. 34, K. 357; *P. v. Cummings*, 114 Cal. 437, 46 P. 284, M. 847.

⁵ *Reg. v. Eagleton*, Dears. 515.

⁶ *S. v. Moore*, 15 Ia. 412.

⁷ *S. v. Burrows*, 11 Ired. (N. C.) 477.

⁸ *S. v. Black*, 75 Wis. 490, 44 N. W. 635.

⁹ *Ante*, §§ 278, 278a.

¹⁰ *Reg. v. Kilham*, L. R. 1 C. C. 261, C. 411, K. 347; *P. v. Johnson*, 91 Cal. 265, 27 P. 663; *S. v. Vickery*, 19 Tex. 326.

property, the person who obtains it by fraud may give a good title.¹ If the owner is tricked out of the possession, and does not mean to part with the property, it is larceny; but if he is tricked out of both, yet means to part with his property, it is obtaining property by false pretences.²

It would seem that the same principle should apply even though the prosecutor was induced to part with the title to his property only because of a mistake as to the identity of the person, if it was in fact his intention, although caused by this mistake, to pass title to the individual then before him. It is an obtaining by false pretences if there is in fact an intent to pass title; and the crime seems complete even though the mistake may render the title voidable.³ The same principle has been applied to a somewhat different case, viz., where the defendant obtained goods by pretending to be sent by the purchaser.⁴ This latter case differs from the former cases in that there the prosecutor did in fact intend, through error, to pass title to the person to whom he delivered the chattel or money; here he did not so intend, and there are decisions that in this latter case the crime is larceny and not false pretences.⁵

¹ *Zink v. P.*, 77 N. Y. 114.

² *Reg. v. Prince*, L. R. 1 C. C. 150, 11 Cox C. C. 193, C. 270. See also the very elaborately considered case of *Reg. v. Middleton*, L. R. 2 C. C. 38, 12 Cox C. C. 260, 417, 1 Green's Cr. Law Rep. 4, K. 266, M. 794.

³ *Cleasby, B.*, in *Reg. v. Middleton*, *ante*: *Williams v. S.*, 49 Ind. 367; *contra*, *S. v. Brown*, 25 Ia. 561 (statutory). See *C. v. Jeffries*, 7 All. (Mass.) 548.

⁴ *Rex v. Coleman*, 2 East P. C. 672; *Rex v. Atkinson*, 2 East P. C. 673; *Rex v. Adams*, Russ. & Ry. 225, C. 410; *P. v. Johnson*, 12 Johns. (N. Y.) 292; *Lewer v. C.*, 15 S. & R. (Pa.) 93. See *Reg. v. Butcher*, 8 Cox C. C. 77.

⁵ *Harris v. S.*, 81 Ga. 758, 7 S. E. 689; *Collins v. Ralli*, 20 Hun (N. Y.), 246; *P. v. Jackson*, 3 Park. (N. Y.) Cr. R. 590; *Mitchell v. S.*, 92 Tenn. 638, 23 S. W. 68. A further distinction has sometimes been attempted: viz., that though there was no error as to the identity of the parties, and though there was an intent to transfer title to the person then present, if the intent of the owner in transferring it was to accomplish one end and the defendant took it for another and dishonest end, the title never passed inasmuch as there was no meeting of minds, *Reg. v. Buckmaster*, 16 Cox C. C. 339, C. 316. See also *Reg. v. Russet* [1892], 2 Q. B. D. 312,

CHEATING.

§ 318. **Cheating** is the fraudulent pecuniary injury of another by some token, device, or practice of such a character as is calculated to deceive the public.¹ Thus, selling bread for the army, and marking the weight falsely upon the barrels;² or selling by false weights³ or measures;⁴ or playing with false dice;⁵ or arranging the contents of a barrel so that the top shall indicate that it contains one thing, while in fact it contains another and worthless thing, coupled with the assertion that the contents are “just as good at the bottom as at top”;⁶ or selling a picture or cloth falsely marked with the name or trade-mark of a well-known artist⁷ or manufacturer;⁸ or the use of false papers,⁹—have been held to be cheats at common law. So has obtaining release from imprisonment by a debtor by means of a forged order from the creditor upon the sheriff.¹⁰ So it has been held that obtaining from an illiterate person a signature to a note different in amount from that agreed on, by false reading, is a cheat.¹¹ So, doubtless,

K. 349; *P. v. Miller*, 169 N. Y. 339, 62 N. E. 418. This principle would seem to be extensive enough to make almost every case of false pretences larceny; and seems opposed to the great weight of authority. See, in addition to cases cited *ante*, *Kellog v. S.*, 26 O. St. 15; *Pitts v. S.*, 5 Tex. App. 122.

¹ 1 Hawk. P. C. (8th ed.) 318, § 1. See also *Rex v. Wheatly*, 2 Burr. 1125, 1 Benn. & Heard's Lead. Cr. Cas. 1, and notes, as to distinction between mere private cheats and those which affect the public so as to become criminal.

² *Resp. v. Powell*, 1 Dall. (Pa.) 47.

³ *Young v. Rex*, 3 T. R. 98.

⁴ *Rex v. Osborn*, 3 Burr. 1697; *P. v. Fish*, 4 Park. (N. Y.) Cr. R. 206.

⁵ *Leeser's Case*, Cro. Jac. 497; *Rex v. Maddocke*, 2 Rolle, 107.

⁶ *S. v. Jones*, 70 N. C. 75.

⁷ *Reg. v. Closs*, D. & B. C. C. 460.

⁸ *Rex v. Edwards*, 1 Trem. P. C. 103.

⁹ *Serlested's Case*, Latch 202; *C. v. Boynton*, 2 Mass. 77; *Lewis v. C.*, 2 S. & R. (Pa.) 551; *S. v. Stroll*, 1 Rich. (S. C.) 244; *C. v. Speer*, 2 Va. Cas. 65.

¹⁰ *Rex v. Fawcett*, 2 East P. C. 862.

¹¹ *Hill v. S.*, 1 Yerg. (Tenn.) 76; 1 Hawk. P. C. (8th ed.) 218, § 1.

would be obtaining money by begging, under the device of putting the arm in a sling, for the purpose of making it appear that it had been injured when it had not. It is an indictable offence to maim one's self whereby the more successfully to beg,¹ or to disqualify one's self for service as a soldier.²

Mere lying by words, although successful in fraudulently obtaining the goods of another, without the aid of some visible sign, token, device, or practice, has never been held at common law to be a cheating.³

§ 319. **Token. Device.**—A token is a thing which denotes the existence of a fact, and if false, and calculated to deceive generally, it will render the person who knowingly uses it for the purpose of inducing the belief that the fact denoted does exist, to the pecuniary injury of another, guilty of the crime of cheating. A business card, in common form, purporting to be the card of an existing firm, which is not genuine, and asserts as fact what is not true, is a false token.⁴

A forged order for the delivery of goods is held to be a token, and obtaining goods in this way a cheat, while obtaining them by the mere verbal false representation that the person purporting to be the signer of the order had sent for them would not be so.⁵ And so is the forged check of another than the person who presents it;⁶ but not, it is said, his own worthless check upon a bank where he has never had a deposit,⁷ this being merely a false representation in writing. But it is difficult to see why the writing is a token in one case and not in the other. Such subtle distinctions have now very generally been obviated by statutes making the obtaining of money by false pretences criminal.⁸

¹ 1 Inst. 127.

² 3 Burn's J. P. (13th ed.) 741, s. v. Maim.

³ *Rex v. Grantham*, 11 Mod. 222; *Rex v. Osborn*, 3 Burr. 1697; *C. v. Warren*, 6 Mass. 72; *P. v. Babcock*, 7 Johns. (N. Y.) 201; *S. v. Delyon*, 1 Bay (S. C.), 353.

⁴ *Jones v. S.*, 50 Ind. 473.

⁵ *Rex v. Thorn*, C. & M. 206; *Rex v. Grantham*, *ante*.

⁶ *C. v. Boynton*, 2 Mass. 77.

⁷ *Rex v. Jackson*, 3 Camp. 370.

⁸ See False Pretences.

False personations were formerly held to be cheats,¹ and even falsehoods as to personal identity, age, or condition; and perhaps would now be,² where statutes do not provide for such frauds. There seems to be no reason, upon principle, why one who falsely asserts that he is what he naturally or by device falsely appears to be, should not be held guilty of cheating, as availing himself of a visible sign.³

§ 320. **Swindling.** — In South Carolina, the subject of cheating was early made a matter of statutory regulation, providing for the punishment of “any person who shall overreach, cheat, or defraud by any cunning, swindling acts and devices, so that the ignorant or unwary may be deluded thereby out of their money or property,” under which obtaining horses from an unsophisticated person by means of threats to prosecute for horse-stealing, and that the pretended owner would have his life if he did not give them up, was held indictable.⁴ And in Georgia, obtaining money by false pretences is a form of swindling.⁵

MALICIOUS MISCHIEF.

§ 321. **Malicious Mischief**, at common law, was confined to injuries to personal property. Injuries to the realty were held to be matters only of trespass. And such, perhaps, were all injuries to personal property, short of their destruction.⁶ But such injuries, both to personal and real property, came to be of such frequency and seriousness that they were made matters of special statute regulation, for the purpose of providing a more adequate remedy and a severer punishment than was permitted by the common law. And from the time of Henry VIII, down to the present time, both in England

¹ *Rex v. Dupee*, 2 Sess. Cas. 11.

² *Rex v. Hanson*, Say. 229.

³ 1 Gab. Cr. Law, 204.

⁴ *S. v. Vaughan*, 1 Bay (S. C.), 282.

⁵ Code, § 4587.

⁶ *S. v. Beekman*, 27 N. J. L. 124; *S. v. Manuel*, 72 N. C. 201. But see *P. v. Smith*, 5 Cow. (N. Y.) 258; *Loomis v. Edgerton*, 19 Wend. (N. Y.) 419.

and in this country, a great number of statutes have been passed touching the subject, covering such forms of mischief as then existed and from time to time grew out of the changing circumstances of society, till now almost every form of such mischief is made the subject of statute regulation, and but few cases arise which are cognizable only by the common law. Nevertheless, the common law is looked to, so far as it is applicable, in aid of the interpretation of the statutes. In many cases the dividing line between malicious mischief and larceny is very shadowy, as where there is a total destruction of the property without any apparent advantage to the destroyer.¹ Indeed, it has been held that the same facts might support an indictment for either offence.²

§ 322. **Malice**, in all that class of crimes included under the general category of "malicious mischief," is not adequately interpreted by the ordinary legal definition of malice; to wit, the voluntary doing of an unlawful act without lawful excuse.³ But it is a more specific and less general purpose of evil. It is defined by Blackstone as a "spirit of wanton cruelty, or black and diabolical revenge."⁴ And, in a case where the prosecution was for wilfully and maliciously shooting a certain animal, the court held that to constitute the offence the act must be not only voluntarily unlawful and without legal excuse, but that it must be done in a spirit of wanton cruelty or wicked revenge.⁵

And such has been held to be the true interpretation of a statute which punishes mischief done "wilfully *or* maliciously,"⁶ and even where it punishes mischief "wilfully" done, — the history of the legislation of which the statute formed a

¹ *Ante*, § 290.

² *Snap v. P.*, 19 Ill. 80; *Parris v. P.*, 76 Ill. 274; *S. v. Leavitt*, 32 Me. 183; *P. v. Moody*, 5 Park. (N. Y.) Cr. R. 568; *S. v. Helmes*, 5 Ired. (N. C.) 364.

³ *Ante*, § 33.

⁴ 4 Bl. Com. 244.

⁵ *C. v. Walden*, 3 Cush. (Mass.) 558. See also *Duncan v. S.*, 49 Miss. 331; *Goforth v. S.*, 8 Humph. (Tenn.) 37; *Branch v. S.*, 41 Tex. 622.

⁶ *C. v. Williams*, 110 Mass. 401.

part showing that such was the intent of the legislature.¹ Doing or omitting to do a thing, knowingly and wilfully, implies not only a knowledge of the thing, but a determination, with a bad intent or purpose, to do it, or omit doing it.²

There is, undoubtedly, in most cases, an element of personal hostility and spite, of actual ill will and resentment toward some individual or particular community, and in some cases this is held to be essential;³ but, unless restricted to these by statute, there seems to be no reason to doubt that wanton cruelty or injury to or destruction of property, committed under such circumstances as to indicate a malignant spirit of mischief, indiscriminate in its purpose, as where one goes up and down the street throwing a destructive acid upon the clothes of such as may be passing to and fro, for no other purpose than to do the mischief, would be held to constitute the offence.⁴ Yet it has been held that proof of malice toward a son is not admissible on an indictment for malicious injury to the property of the father;⁵ while, on the other hand, it has been held that proof of malice toward a bailee is admissible on an indictment for injury of property described in the indictment as belonging to the bailor.⁶ Mere malice toward the property injured, however, as where one injures a horse out of passion or dislike of the horse, is not sufficient to constitute the offence;⁷ but wanton and cruel mischief to an animal from a bad mind, without personal ill feeling, is malicious mischief;⁸ and so, it has been held,

¹ *S. v. Clark*, 5 Dutch. (N. J.) 96.

² *C. v. Kneeland*, 20 Pick. (Mass.) 203; *Felton v. U. S.*, 96 U. S. 699.

³ *Hobson v. S.*, 44 Ala. 380; *S. v. Pierce*, 7 Ala. 728; *S. v. Robinson*, 3 Dev. & Batt. (N. C.) 130; *S. v. Newby*, 64 N. C. 23.

⁴ *Mosely v. S.*, 28 Ga. 190; *Duncan v. S.*, 49 Miss. 331; *S. v. Landreth*, 2 Car. L. R. 446.

⁵ *Northcot v. S.*, 43 Ala. 330.

⁶ *Stone v. S.*, 3 Heisk. (Tenn.) 457.

⁷ 2 East P. C. 1072; *Shepherd's Case*, 2 Leach (4th ed.), 539; *S. v. Wilcox*, 3 Yerg. (Tenn.) 273. Compare *Terr. v. Olsen*, 6 Utah, 284, 22 P. 163.

⁸ *Mosely v. S.*, *ante*; *accord*, *Terr. v. Crozier*, 6 Dak. 8, 50 N. W. 124; *S. v. Williamson*, 68 Ia. 351, 27 N. W. 259; *S. v. Avery*, 44 N. H. 392.

is the wanton destruction of a dwelling-house¹ or other building.²

In order to bring the act within the purview of the law against malicious mischief, it must appear that the mischief is done intentionally, and perhaps it is not too much to say for the purpose of doing it, and not as incidental to the perpetration of some other act, or the accomplishment of some other purpose, however unlawful. Thus, where one breaks a door or window to gratify his passion for theft, or his lust, or while he is engaged in an assault, or if the injury be done in the pursuit of pleasure, as in hunting or fishing, or for the protection of his crops, or in any other enterprise, lawful or unlawful, where the injury is not the end sought, but is merely incidental thereto, the act does not constitute the offence of malicious mischief.³ And where the injury is done under a supposed right, claimed in good faith, there is no malice in the sense of the law.⁴

There must be an actual destruction of, or injury to, the property. Thus merely throwing down a pile of goods is not within the statute.⁵

§ 323. **Malice Inferable from Circumstances.** — Direct proof of express malice by actual threats is not necessary, but it may be inferred from the attendant facts and circumstances.⁶

¹ *S. v. Gilligan*, 23 R. I. 400, 50 Atl. 844.

² *S. v. Boies*, 68 Kan. 167, 74 Pac. 630.

³ *Reg. v. Pembrton*, L. R. 2 C. C. 119, 12 Cox C. C. 607, 2 Greene's C. L. R. 19, C. 120, K. 157, M. 171; *Wright v. S.*, 30 Ga. 325; *S. v. Bush*, 29 Ind. 110; *S. v. Clark*, 5 Dutch. (N. J.) 96; *Duncan v. S.*, 49 Miss. 331; *contra*, *P. v. Burkhardt*, 72 Mich. 172, 40 N. W. 240; *Funderburk v. S.*, 75 Miss. 20, 21 So. 658.

⁴ *Reg. v. Langford*, C. & M. 602; *S. v. Foote*, 71 Conn. 737, 43 Atl. 488; *Sattler v. P.*, 59 Ill. 68; *Palmer v. S.*, 45 Ind. 388; *S. v. Flynn*, 28 Ia. 26; *S. v. Newkirk*, 49 Mo. 84; *S. v. Hause*, 71 N. C. 518; *Goforth v. S.*, 8 Humph. (Tenn.) 37; *Woodward v. S.*, 33 Tex. Cr. R. 554, 28 S. W. 204.

⁵ *Pollet v. S.*, 115 Ga. 234, 41 S. E. 606; *Rose v. S.*, 19 Tex. App. 470.

⁶ *S. v. Pierce*, 7 Ala. 728; *S. v. McDermott*, 36 Ia. 107. Compare *Porter v. S.*, 83 Miss. 23, 35 So. 218.

RECEIVING STOLEN GOODS.

§ 324. **Receiving Stolen Goods**, knowing them to be stolen, was originally an accessorial offence, of which the receiver could only be convicted after the conviction of the thief; but it long since became, both in England and in this country, a substantive offence, triable separately, and without reference to the crime of the principal.¹

Receiving stolen goods, knowing them to be stolen, for the purpose of aiding the thief in concealing them or in escaping with them, is as much an offence as if the receiving be done with the hope of obtaining a reward from the owner, or other pecuniary gain or advantage.² But there must be a fraudulent intent to deprive the true owner of his interest in them.³

§ 325. **Receiving.** — To constitute one a receiver, the stolen goods need not have come into his actual manual possession. It is enough if they have come under his observation and control, as where a person allows a trunk of stolen goods to be placed on board a vessel as part of his luggage.⁴ So where the thief puts money in the hands of a bank teller to count and the defendant then directs the teller to credit the sum to his, the defendant's account, the defendant, after the sum has been so credited, is liable as a receiver.⁵ But there must be such control as is at least equivalent to constructive possession.⁶

¹ *Reg. v. Caspar*, 2 Moo. C. C. 101, 2 Leading Cr. Cas. 451, and note; *Reg. v. Hughes*, 8 Cox C. C. 278; *S. v. Weston*, 9 Conn. 527; *Loyd v. S.*, 42 Ga. 221; *C. v. King*, 9 Cush. (Mass.) 284; *S. v. Coppenburg*, 2 Strobb. (S. C.) 273.

² *Rex v. Richardson*, 6 C. & P. 335, C. 465; *Rex v. Davis*, 6 C. & P. 177, M. 903; *C. v. Bean*, 117 Mass. 141, C. 465; *P. v. Caswell*, 21 Wend. (N. Y.) 86; *P. v. Wiley*, 3 Hill (N. Y.), 194, C. 438, M. 904; *S. v. Rushing*, 69 N. C. 29; *S. v. Hazard*, 2 R. I. 474.

³ *Pelts v. S.*, 3 Blackf. (Ind.) 28; *Goldsberry v. S.*, 66 Neb. 312, 92 N. W. 906; *P. v. Johnson*, 1 Park. (N. Y.) Cr. R. 564; *Rice v. S.*, 3 Heisk. (Tenn.) 215.

⁴ *Reg. v. Smith*, 6 Cox C. C. 554; *Reg. v. Rogers*, 37 L. J. n. s. M. C. 83, C. 458; *S. v. St. Clair*, 17 Ia. 149; *S. v. Scovel*, 1 Mill (S. C.), 274.

⁵ *P. v. Ammon*, 92 App. Div. (N. Y.) 295, 87 N. Y. S. 358.

⁶ *Reg. v. Wiley*, 4 Cox C. C. 412, 2 Den. C. C. 37, C. 445, K. 361, M. 895.

If one finds property which he has reason to believe was stolen, and seeks to turn it to his pecuniary advantage, he may be convicted of receiving stolen goods.¹ The owner may be a receiver as well as a thief, if the goods be received from one who stole them from the owner's bailee.² But as the wife cannot under any circumstances steal from the husband, one who receives from her cannot be convicted of receiving stolen goods.³

§ 326. **When Goods Cease to Be Stolen Goods.** — The crime can be committed so long only as the goods continue to have the character of stolen goods. Where they have come back into the control of the owner, but he, in order to detect the thief or the receiver, takes measures to have them offered to the receiver, they have ceased to be stolen goods, and the receiver cannot be convicted.⁴ Nor are the goods to be treated as stolen except in a jurisdiction where the larceny can be inquired into; consequently, where goods are stolen in one jurisdiction and brought into another, the receiver cannot be convicted in the latter jurisdiction.⁵ In those jurisdictions, however, where a thief who himself brings into the State goods stolen outside it may be convicted of larceny, one who receives from the thief goods stolen outside may be convicted of receiving, since the goods continue to be stolen goods.⁶

§ 327. **Knowledge.** — The receiver need not have been absolutely certain that the goods were stolen; it is enough if he had reasonable grounds for believing them to be stolen.⁷ And

¹ *C. v. Moreland*, 27 Pitts. L. J. (Pa.) No 45.

² *P. v. Wiley*, 3 Hill (N. Y.), 194, C. 438, M. 904; *ante*, § 155.

³ *Reg. v. Kenny*, 2 Q. B. D. 307, 13 Cox C. C. 397, C. 359; *Reg. v. Streeter* [1900] 2 Q. B. D. 601, 19 Cox C. C. 570, K. 367, M. 892.

⁴ *Reg. v. Dolan*, 6 Cox C. C. 449, 1 Dears. 436, C. 417; *Reg. v. Schmidt*, L. R. 1 C. C. C. 15, 10 Cox C. C. 172, C. 421, M. 885; *U. S. v. De Bare*, 6 Biss. (U. S. Dist. Ct.) 358, Fed. Cas. No. 14,935, C. 426.

⁵ *Rex v. Prowes*, 1 Moo. C. C. 349, C. 379; *Reg. v. Madge*, 9 C. & P. 29, C. 428.

⁶ *C. v. Andrews*, 2 Mass. 14, C. 436; *P. v. Wiley*, *ante*.

⁷ *Reg. v. White*, 1 F. & F. 665, C. 469; *Birdsong v. S.*, 120 Ga. 850, 48 S. E. 329; *Huggins v. P.*, 135 Ill. 243, 25 N. E. 1002; *Frank v. S.*, 67 Miss. 125, 6 So. 842, M. 901; *S. v. Druxinman*, 34 Wash. 257, 75 P. 814.

if he had knowledge of the circumstances, he need not have known that in law they were sufficient to constitute larceny.¹ But if, knowing the circumstances, he believed them not to constitute a crime at all, the element of guilty knowledge is lacking, and the receiver cannot be convicted.²

The guilty knowledge must exist at the time of taking possession. Where the goods are received in good faith a subsequent knowledge that they were stolen and intent to keep will not constitute the crime of receiving,³ though it will render the defendant liable under a statute that also punishes the concealing of stolen goods.⁴

§ 328. **Evidence.** — Recent possession, without any evidence that the property stolen had been in the possession of some person other than the owner before it came to the alleged receiver, or other circumstances to rebut the presumption of larceny, is rather evidence of larceny than of receiving stolen goods.⁵ And evidence of the possession of other stolen goods cannot be given to show that the receiver knew the particular goods in question to be stolen.⁶

FORGERY.

§ 329. **Forgery** is “the fraudulent making or altering of a writing to the prejudice of another man’s right,”⁷ — the word “writing” including printed and engraved matter as well,⁸ but not a painting with the name of the artist falsely signed,⁹ nor a wrapper about a box of baking-powder.¹⁰ The

Compare *Cohn v. P.*, 197 Ill. 482, 64 N. E. 306; *S. v. Goldman* (N. J.), 47 Atl. 641.

¹ *C. v. Leonard*, 140 Mass. 473, 4 N. E. 96, C. 466.

² *Reg. v. Adams*, 1 F. & F. 86, C. 468; *C. v. Leonard*, *ante*.

³ *Pat v. S.*, 116 Ga. 92, 42 S. E. 389. Compare *Reg. v. Woodward*, 9 Cox C. C. 95, C. 457, M. 898.

⁴ *Rowland v. S.*, 140 Ala. 142, 37 So. 245.

⁵ *Rex v. Cordy*, cited in note to Pomeroy’s edition of Archbold Cr. Pr. & Pl. vol. ii, p. 479; *Reg. v. Langmead*, 9 Cox C. C. 464.

⁶ *Reg. v. Oddy*, 5 Cox C. C. 210, C. 469.

⁷ 4 Bl. Com. 247.

⁸ *C. v. Ray*, 3 Gray (Mass.), 441.

⁹ *Reg. v. Closs*, 7 Cox C. C. 494, D. & B. 460, K. 184.

¹⁰ *Reg. v. Smith*, 8 Cox C. C. 32, D. & B. 566, K. 186, M.

instrument forged, it is generally held, must purport upon its face in some way to prejudice the legal rights or pecuniary interest of the supposed signer, or of the person defrauded. Thus, a recommendation of one person to another as a person of pecuniary responsibility may be the subject of forgery.¹ And it has been held in England that the false making of a letter of recommendation, whereby to procure an appointment as school teacher,² or as constable,³ — or a certificate of good character, whereby to enable the person in whose favor it is made to obtain a certificate of qualification for a particular service, — is an indictable forgery at common law;⁴ — extreme cases, no doubt, and founded perhaps on an old statute (33 Hen. VIII, c. 1, — not, however, so far as appears by the reports, referred to in either case), whereby cheating by false “privy tokens and counterfeit letters in other men’s names” is made an indictable offence. But the false making of a mere recommendation of one person to the hospitalities of another, with a promise to reciprocate, has been held in this country to be no forgery.⁵ Whether, in a case precisely analogous to the English cases just referred to, our courts would follow them, remains to be seen. Undoubtedly they would, wherever a substantially similar statute may be found.⁶ The “*prejudice to another man’s right*” may apply as well to the party imposed upon as to the person whose name is forged. As to the latter, no doubt the writing must import his legal liability in some way. But as to the former, if he is defrauded or imposed upon, or the forgery is made with fraudulent intent, the act seems to come clearly within the definition. It is certainly to be questioned whether the law will allow a man to live upon the hospitalities of his fellows, which he has obtained by forged letters of recommendation. The forgery is not the less a forgery because it is made use of as a false pretence.⁷

¹ S. v. Ames, 2 Greenl. (Me.) 365.

² Reg. v. Sharman, Dears. C. C. 285.

³ Reg. v. Moah, D. & B. C. C. 550.

⁴ Reg. v. Toshack, 1 Den. C. C. 492.

⁵ West v. S. (Fla.), 33 So. 854; Waterman v. P., 67 Ill. 91.

⁶ C. v. Hartnett, 3 Gray (Mass.), 450.

⁷ C. v. Coe, 115 Mass. 481, 2 Green’s C. L. R. 292.

§ 330. **Forgery Must Be Material.** — The false making, however, must be of some instrument having pecuniary importance, or its alteration in some material respect.

A very slight alteration, however, may be material. It has been held in England that the alteration of the name of the person to whom a note is payable, the alteration being from the name of an insolvent to a solvent firm,¹ and in this country, that the alteration of the name of the place where payable, is material. And alteration by erasure constitutes the offence.² So does any other erasure, or detachment from or leaving out, as from a will, of a material part of the instrument whereby its effect is changed.³ If the instrument do not purport to be of any legal force, whether its invalidity be matter of form or substance, — as if it be a contract without consideration,⁴ or a copy of a contract,⁵ or a will not witnessed by the requisite number of witnesses,⁶ or a bond or other instrument created and defined by statute, but not executed conformably to the statute,⁷ — then the false making or alteration is not a forgery. The addition, moreover, of such words as the law would supply,⁸ or of a word or words otherwise immaterial, and such as would not change the legal effect of the instrument, — as where the name of a witness is added to a promissory note, in those States where the witness is immaterial, — would not constitute the offence;⁹ though, doubtless, in those States where such addition would be material, by making, as in Massachusetts, the security good for twenty

¹ *Rex v. Treble*, 2 Taunt. 328; *S. v. Robinson*, 1 Harr. (N. J.) 507.

² *White v. Hass*, 32 Ala. 430.

³ *Combe's Case*, Noy, 101; *S. v. Stratton*, 27 Ia. 420.

⁴ *P. v. Shall*, 9 Cow. (N. Y.) 778.

⁵ *C. v. Brewer*, 24 Ky. L. R. 72, 67 S. W. 994.

⁶ *Rex v. Wall*, 2 East P. C. 953, M. 937; *S. v. Smith*, 8 Yerg. (Tenn.) 150.

⁷ *Cunningham v. P.*, 4 Hun (N. Y.), 455; *Crayton v. S.* (Tex.), 80 S. W. 839. Compare *Pearson v. C.*, 25 Ky. L. R. 1866, 78 S. W. 1112.

⁸ *Hunt v. Adams*, 6 Mass. 519.

⁹ *Turnipseed v. S.* (Fla.), 33 So. 851; *S. v. Gherkin*, 7 Ired. (N. C.) 206.

instead of six years, such an alteration would be held a forgery. Nor, it seems, would the alteration of the marginal embellishments or marks of a bank-note, not material to the validity of the note, constitute forgery.¹

If the instrument forged does not appear upon its face to have any legal or pecuniary efficacy, it must be shown by proper averments in the indictment how it may have.²

§ 331. **Legal Capacity. Fictitious Name.** — It is not essential that the person in whose name the instrument purporting to be made should have the legal capacity to act, nor that the person to whom it is directed should be bound to act upon it, if genuine, or should have a remedy over.³ Indeed, the forged name may be that of a fictitious person,⁴ or of one deceased,⁵ or of an expired corporation.⁶ But signing to a note the name of a firm which in fact does not exist, one of the names in the alleged firm being that of the signer of the note, is not forgery.⁷ Even the signing of one's own name, it being the same as that of another person, the intent being to deceive and defraud, by using the instrument as that of the other person,⁸ may constitute the offence. But the alteration of one's own signature to give it the appearance of forgery, though with a fraudulent intent, is not forgery.⁹ And where two persons have the same name, but different addresses, and a bill is directed to one with his proper address, but is received by the other, who accepts it, adding his proper address, the acceptance is not a forgery.¹⁰

¹ *S. v. Waters*, 3 Brev. (S. C.) 507.

² *P. v. Tomlinson*, 35 Cal. 503; *S. v. Pierce*, 8 Ia. 231; *C. v. Ray*, 3 Gray (Mass.), 441; *S. v. Wheeler*, 19 Minn. 98; *France v. S.*, 83 Miss. 281, 35 So. 313; *post*, § 334.

³ *S. v. Kimball*, 50 Me. 409; *P. v. Krummer*, 4 Park. (N. Y.) Cr. R. 217.

⁴ *Rex v. Bolland*, 1 Leach C. C. (4th ed.) 83; *Rex v. Marshall*, Russ. & Ry. 75; *P. v. Davis*, 21 Wend. (N. Y.) 309; *Sasser v. S.*, 13 O. 453.

⁵ *Henderson v. S.*, 14 Tex. 503.

⁶ *Buckland v. C.*, 8 Leigh (Va.), 732.

⁷ *C. v. Baldwin*, 11 Gray (Mass.), 197, M. 940.

⁸ *Mead v. Young*, 4 T. R. 28, K. 197; *C. v. Foster*, 114 Mass. 311; *P. v. Peacock*, 6 Cow. (N. Y.) 72.

⁹ *Brittain v. Bank of London*, 3 F. & F. 465.

¹⁰ *Rex v. Webb*, 3 B. & B. 228.

§ 332. **The Alteration** may be by indorsing another name on the back of a promissory note,¹ or by falsely filling up an instrument signed in blank, as by inserting or changing the words of a complete instrument,² or by writing over a signature on a piece of blank paper,³ or by tearing off a condition from a non-negotiable instrument, whereby it becomes so altered as to purport to be negotiable,⁴ or by pasting one word over another,⁵ or by making a mark instead of a signature,⁶ or by photographing.⁷ So the alteration of an entry, or making a false entry, by a clerk in the books of his employer, with intent to defraud, is a forgery.⁸ And so is the obtaining by the grantee from the grantor his signature to a deed different from that which had been drawn up and read to the grantor,⁹ or by the promisee from the promisor his signature to a note for a greater amount than had been agreed upon.¹⁰ And in England it has been quite recently held, upon much consideration, that where a man who had deeded away his property afterward, by another deed falsely antedated, conveyed to his son a part of the same property, he was guilty of forgery ;¹¹ — a doctrine which, however, has not only not been adopted, but has been doubted, in this country,¹² where the received doctrine is, that a writing in order to be the subject of forgery must in general be, or purport to be, the act of another ; or it must at the time be the property of another ; or it must be some writing under which others have acquired rights. or have become liable, and in which these rights and liabilities

¹ *Powell v. C.*, 11 Grat. (Va.) 822.

² *S. v. Kroeger*, 47 Mo. 552 ; *S. v. Donovan*, 75 Vt. 308, 55 Atl. 611 ; *Lawless v. S.*, 114 Wis. 189, 89 N. W. 891.

³ *Caulkins v. Whisler*, 29 Ia. 495.

⁴ *S. v. Stratton*, 27 Ia. 420 ; *Benedict v. Cowden*, 49 N. Y. 396.

⁵ *S. v. Robinson*, 1 Harr. (N. J.) 507.

⁶ *Rex v. Dunn*, 2 East P. C. 962.

⁷ *Reg. v. Rinaldi*, 9 Cox C. C. 391.

⁸ *Reg. v. Smith, L. & C. C. C.* 168 ; *Biles v. C.*, 32 Pa. 529.

⁹ *S. v. Shurtliff*, 18 Me. 368.

¹⁰ *C. v. Sankey*, 22 Pa. 390, M. 943.

¹¹ *Reg. v. Ritson*, L. R. 1 C. C. 200, K. 188.

¹² 2 Bish. New Cr. Law, §§ 584, 585.

are sought to be changed by the alteration, to their prejudice, and without their consent.¹ Under this rule it seems that the maker of an instrument may be guilty of forgery by altering it after it has been delivered and becomes the property of another;² but the alteration of a draft by the drawer, after it has been accepted and paid and returned to him, is no forgery, but rather the drawing of a new draft.³ But where the draft was also a receipt, an alteration of that by the drawer of the draft so as to make it read as a receipt in full was held forgery.⁴

§ 333. **Filling Blanks.** — One may be guilty of forgery by merely filling up blanks without authority. Thus, if an employer leaves with a clerk checks signed in blank, with authority to fill them only for a certain purpose, and he fills them for another purpose, he is guilty of forgery; but if there is general authority to fill the blanks, it is no forgery, even if they are filled for an illegal purpose.⁵

§ 334. **Intent to Defraud** is a necessary element in the crime of forgery. But it is not necessary that the fraud should become operative and effectual, so that some one is in fact defrauded, nor need the intent be to defraud any particular person, or other than a general intent to defraud some person or other.⁶ Nor is it necessary that the fraud should have been perpetrated in just the way the defendant had in mind, if it does in fact operate to the prejudice of another and there was the intent to defraud.⁷ Nor is the fact that he intended later to make reparation any defence.⁸ But there must be at

¹ *C. v. Baldwin*, 11 Gray (Mass.), 197, M. 940; *S. v. Young*, 46 N. H. 266.

² *C. v. Mycall*, 2 Mass. 136; *S. v. Young*, *ante*.

³ *P. v. Fitch*, 1 Wend. (N. Y.) 198.

⁴ *Gordon v. C.*, 100 Va. 825, 41 S. E. 746.

⁵ *Wright's Case*, 1 Lewin, 135, M. 943; *P. v. Reinitz*, 6 N. Y. S. 672; *P. v. Dickie*, 62 Hun (N. Y.), 400, 17 N. Y. S. 51.

⁶ *Rex v. Ward*, 2 Ld. Raym. 1461, M. 932; *C. v. Ladd*, 15 Mass. 526; *Henderson v. S.*, 14 Tex. 503.

⁷ *King v. S.*, 43 Fla. 211, 31 So. 251; *Brazil v. S.*, 117 Ga. 32, 43 S. E. 460.

⁸ *Reg. v. Hill*, 2 Moo. 30, K. 208; *C. v. Henry*, 118 Mass. 460.

least the general intent to defraud. Hence where defendant forged a medical diploma merely for the purpose of giving himself a better standing, it was held that there had been no forgery.¹ But where the forging of the certificate was to get a particular appointment,² or a payment that could not otherwise be obtained,³ the crime was committed. So an alteration by one party to an instrument, to make it conform to what was mutually agreed upon, being without fraudulent intent, lacks the essential quality of fraud.⁴ So an endorsement by the defendant of the name of the payee, when he believed that he had a right so to do.⁵

The lack of similitude between a genuine and a forged signature is immaterial, except as bearing upon the question of intent. The fact of no resemblance at all gives rise to the inference that there was no fraudulent intent. But if the signature be proved, the presumption of fraud arises, whether there is any resemblance or not between the genuine and forged signatures.⁶

And even if the resemblance be close and calculated to deceive, the act may be shown to have been done without any fraudulent intent.⁷ As the essence of forgery is the intent to defraud, the mere imitation of another's writing, or the alteration of an instrument whereby no person can be pecuniarily injured, does not come within the definition of the offence. And if this probability of injury does not appear on the face of the instrument, it must be shown in the indictment, by proper averments, how the injury may happen. Thus, the

¹ *Reg. v. Hodgson*, D. & B. 3, K. 202, M. 946; *Maddox v. S.*, 87 Ga. 429, 13 S. E. 559.

² *Reg. v. Toshack*, 1 Den. C. C. 492; *Reg. v. Sharman*, Dears. C. C. 285.

³ *Arnold v. S.*, 71 Ark. 367, 74 S. W. 513.

⁴ *Pauli v. C.*, 89 Pa. 432.

⁵ *S. v. Bjornaas*, 88 Minn. 301, 92 N. W. 980.

⁶ *Mazagora's Case*, R. & R. 291; *Reg. v. Jessop*, D. & B. C. C. 442; *Reg. v. Coulson*, 1 Den. C. C. 592; *S. v. Anderson*, 30 La. Ann. 557; *C. v. Stephenson*, 11 Cush. (Mass.) 481.

⁷ *Reg. v. Parish*, 8 C. & P. 94; *Rex v. Harris*, 7 C. & P. 428; *C. v. Goodenough*, Thatch. Cr. Cas. (Mass.) 132.

alteration of the date of a check in a check-book does not of itself import injury to any one, and in order to make it the foundation of an indictment, it must be set forth in the indictment how this may happen.¹ Nor does an alteration of an instrument to the prejudice alone of him who alters constitute forgery; as when the holder and payee of a promissory note alters the amount payable to a smaller sum.²

§ 335. **Uttering.** — A forgery is uttered when there is an attempt to make use of it by bringing it to the knowledge of an innocent person.³ This use may be of any sort; pledging is uttering,⁴ and so is merely showing a receipted bill to gain credit.⁵ But showing to an accomplice is not uttering.⁶

Where a forgery is sent into another jurisdiction by mail or other innocent agent, and is shown there, there would seem to be an uttering in both jurisdictions.⁷

COUNTERFEITING.

§ 336. **Counterfeiting** is the making of a false coin in the similitude of the genuine, with intent to defraud. It is a species of forgery, and its distinguishing characteristic is that there must be some appearance of similitude to the thing counterfeited;⁸ whereas in forgery no such similitude is requisite,⁹ and no genuine instrument may have ever existed. Whether there is such similitude seems to be a question of fact for the jury.

Before the adoption of the Constitution of the United States the offence of counterfeiting was punishable in the several

¹ *C. v. Mulholland* (Pa.), 5 Weekly Notes of Cases, 208.

² 1 Hawk. P. C. (8th ed.) 264, § 4. See also Counterfeiting.

³ *Reg. v. Radford*, 1 Den. C. C. 59.

⁴ *Thurmond v. S.*, 25 Tex. App. 366, 8 S. W. 473.

⁵ *Reg. v. Ion*, 2 Den. C. C. 475.

⁶ *Reg. v. Heywood*, 2 C. & K. 352.

⁷ *Reg. v. Taylor*, 4 F. & F. 511; *Reg. v. Finkelstein*, 16 Cox C. C. 107, C. 127.

⁸ *Rex v. Welsh*, 1 East P. C. 164; *Rex v. Varley*, 2 W. Bl. 682; *U. S. v. Marigold*, 9 How. (U. S.) 560, per Daniel, J.; *U. S. v. Morrow*, 4 Wash. C. Ct. 733, Fed. Cas. No. 15,819.

⁹ See *ante*, Forgery.

Colonies under the common law ; but by the adoption of that Constitution the power to coin money was prohibited to the States, and reserved to the United States. Strictly speaking, therefore, there is no such offence as counterfeiting at common law in this country ; but it is wholly an offence created by the statutes of the United States. But the offence is punishable as a cheat, or an attempt to cheat, by the States as well ; and, in point of fact, most of the States, if not all, have statutes against the making and uttering of counterfeit coin.¹

Punished at common law as a cheat, it is a misdemeanor, unless clearly made a felony by statute.²

¹ *Fox v. Ohio*, 5 How. (U. S.) 410; *U. S. v. Marigold*, 9 How. (U. S.) 560; *Moore v. Illinois*, 14 How. (U. S.) 13. See also *S. v. McPherson*, 9 Ia. 53; *Martin v. S.*, 18 Tex. App. 224.

² *Wilson v. S.*, 1 Wis. 184.

CHAPTER IX.

MARITIME OFFENCES.

§ 338. Piracy.

§ 339. Barratry.

§ 337. The common law punishes certain acts committed upon the high seas, when, if committed upon land, the acts would not be criminal, or would be crimes of a different nature. The most important crimes of this nature are piracy and barratry.

PIRACY.

§ 338. "**Piracy** at the common law consists in committing those acts of robbery and depredation upon the high seas which, if committed on the land, would have amounted to felony there."¹ It was originally punishable at common law as petit treason, but not as a felony; and later, by statute,² it is made triable according to the course of the common law, subject to the punishment, — capital, — provided by the civil law.³ Under the law of nations (which is part of the common law), it may be committed by an uncommissioned armed vessel attacking another vessel,⁴ or by feloniously taking from the possession of the master the ship or its furniture, or the goods on board, whether the taking be done by strangers, or by the crew or passengers of the vessel.⁵

¹ 1 Russ. on Crimes, bk. 2, c. 8, § 1.

² 28 Hen. VIII, c. 15.

³ 1 Russ. on Crimes, bk. 2, c. 8, § 1. This statute has been repealed by Stat. 1 Vict. c. 88, § 1.

⁴ Savannah Pirates, Warburton's Trial, 370.

⁵ Attorney General *v.* Kwok-a-Sing, L. R. 5 P. C. 179; *Rex v. Dawson*, 13 How. St. Tr. 451. See also *U. S. v. Tully*, 1 Gall. C. Ct. 247, Fed. Cas. No. 16,545; *U. S. v. Jones*, 3 Wash. C. Ct. 209, Fed. Cas. No. 15,494;

Robbery on board a vessel sailing under a foreign flag is not piracy,¹ but the category of piratical acts has been much extended by statute.²

As the offence, if committed at all, is committed on the high seas, that is, out of the jurisdiction of the States, the adjudications and judicial decisions in this country have been mostly confined to cases arising under the statutory jurisdiction of the courts of the national government.³

A pirate is an outlaw, and may be captured and brought to justice by the ship of any nation.⁴

A commission purporting to be issued by an unknown government, or by a province of an unacknowledged nation, affords no protection; ⁵ and in an action for the condemnation of a vessel engaged in piratical practices under such commission it has been held to be no defence. But as regards the personal liability of those engaged in the act it would seem clear as a matter of principle that their belief in the validity of their commission, like any other fact bearing on the question of good faith, could be received in evidence to show that they were not in fact engaged in committing the depredations piratically but under a belief that by the laws of war they were justified in so doing.⁶

BARRATRY.

§ 339. **Barratry** is a maritime offence, and consists in the wilful misconduct of the master or mariners, for some unlawful purpose, in violation of their duty to the owners of the vessel.

U. S. *v.* Gibert, 2 Sumner C. Ct. 19, Fed. Cas. No. 15,204; U. S. *v.* Pirates, 5 Wheat. (U. S.) 184; *The Antelope*, 10 Wheat. (U. S.) 66.

¹ U. S. *v.* Palmer, 3 Wheat. (U. S.) 610.

² U. S. *v.* Brig Malek Adhel, 2 How. (U. S.) 210. On the question of jurisdiction of a crime committed on board a foreign vessel see the very learned and elaborate case of *C. v. Macloon*, 101 Mass. 1.

³ For the statutory law upon this subject see U. S. Revised Statutes, § 5368.

⁴ *The Marianna Flora*, 11 Wheat. (U. S.) 1.

⁵ U. S. *v.* Klintock, 5 Wheat. (U. S.) 144.

⁶ See U. S. *v.* Klintock, *ante*; *The Ambrose Light*, 27 Fed. 408, at 416.

Thus, stealing from the cargo,¹ wilful deviation in fraud of the owner,² or delay for private gain,³ or for any unlawful purpose,⁴ have severally been held to constitute barratry. So has the unlawful resistance to the search of a belligerent.⁵ And negligence may be so gross as to amount to fraud, just as at common law it may be so gross as to amount to criminality.⁶ It is not necessary that there should be fraud, in the sense of an intention on the part of the accused to promote his own benefit at the expense of the owners, but any wilful act of known illegality, every gross malversation or criminal negligence in the discharge of duty, whereby the owner of the vessel is damnified, comes within the legal definition of barratry.⁷ But the negligence must be so gross as to be evidence of a fraudulent intent.⁸

¹ *Stone v. National Ins. Co.*, 19 Pick. (Mass.) 34.

² *Vallejo v. Wheeler*, Cowp. 143.

³ *Ross v. Hunter*, 4 T. R. 33.

⁴ *Roscow v. Corson*, 8 Taunt. 684.

⁵ *Brown v. Union Ins. Co.*, 5 Day (Conn.), 1.

⁶ *Patapsco Ins. Co. v. Coulter*, 3 Pet. (U. S.) 222.

⁷ *Lawton v. Sun Mut. Ins. Co.*, 2 Cush. (Mass.) 500.

⁸ *Fayerweather v. Phenix Ins. Co.*, 54 N. Y. Super. Ct. 545.

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